U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

Issue Date: 04 May 2004

Case No. 2003-LHC-2107

OWCP No. 5-115561

In the Matter of

TIMOTHY LONG,
Claimant
v.

WASHINGTON GROUP INTERNATIONAL,
Employer

ZURICH AMERICAN INSURANCE COMPANY,
Carrier

Appearances:
Gregory E. Camden, Esq., for Claimant
Joseph F. Giordano, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability and temporary partial disability from an injury alleged to have been suffered by Claimant, Timothy Long, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he was injured while working as a carpenter while employed by Employer; and that as a result he is suffering from an injury to his neck and right shoulder.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on December 2, 2003. (TR).[1] Claimant submitted eighteen exhibits, identified as CX 1 through CX 17, which were admitted

[1] EX - Employer's exhibit; CX - Claimant's exhibit; and TR - Transcript.

without objection. (TR. at 14). Employer submitted eighteen exhibits, EX 1 through EX 18, which were admitted without objection. (TR. at 15). The parties also submitted one joint exhibit, JX 1, which was admitted. (TR. at 11). The record was held open for the submission of briefs until February 6, 2004. (TR. at 141). Claimant and Employer both submitted briefs on February 6, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant has established the necessary status so as to be a covered employee under the Act;

2. Whether Claimant has established the necessary situs so as to be a covered employee under the Act;

3. Whether Claimant is entitled to temporary total disability from December 24, 2002, through May 11, 2003, inclusive, and June 11, 2003, through October 26, 2003, inclusive;

4. Whether Claimant is entitled to temporary partial disability from May 12, 2003, through June 10, 2003, inclusive, and October 27, 2003, through the present and continuing;

5. Whether Employer has demonstrated the availability of suitable alternate employment that Claimant could obtain if he diligently tried;

6. Whether Claimant diligently sought employment; and

7. Whether Employer timely filed a Notice of Controversion.

STIPULATIONS

At the hearing, Claimant and Employer stipulated, and I find:

1. That an employer/employee relationship existed at all relevant times;

2. That the claimant suffered an injury to his neck and right shoulder on October 25, 2002 arising out of and in the course of his employment;

3. That a timely notice of injury was given by the employee to the employer;

4. That a timely claim for compensation was filed by the employee; and

5. That the claimant's average weekly wage at the time of this injury was $768.91 resulting in a compensation rate of $512.61.

(JX 1).

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant worked as a carpenter for Employer from July, 1997, until December 23, 2002. (TR. at 61). As a carpenter, Claimant built scaffolding, form work, and performed maintenance, throughout the refinery. (TR. at 61-62). Claimant received his tasks on a daily basis from the facility office; the jobs varied in the length of time needed to perform them. (TR. at 62).

Claimant testified that during his employment, he built many scaffolds on the piers for different pipelines and the loading arm. He also replaced boards and handrailing on the dock and built form work related to the pier. (TR. at 63). The pipelines to which Claimant built scaffolding include lines that carry crude oil from the ships to the storage tanks and affluent lines that carry water used in the refining process into the York River. Claimant also built scaffolding for repairs on the storage tanks. (TR. at 64-65, 98). The scaffolding allowed the other trades at the refinery to access the areas that needed repaired. (TR. at 96). Claimant estimated that fifteen to twenty percent of his work occurred on or in areas between the pier to the storage tanks, but he did not have any specific records to verify his estimate. (TR. at 66, 96). As a carpenter, Claimant never loaded or unloaded any ships at the Yorktown refinery. (TR. at 96).

Claimant recounted the events when he was injured on October 25, 2002. He stated that he was building scaffolding at the coker port because a leak had occurred there. According to Claimant, a patch that had been placed on the pipeline at the coker unit, and

> [T]he patch blew out right in my area where I was building the scaffolding, like a foot away from me. When it blew up, my reaction was to get away from there. I jumped up and grabbed a pipe and I shoved my hand under another pipe and it was like a shock, I felt scared. I grabbed a pipe, pulled myself up real fast, and it came back down on my arm causing the injury.

(TR. at 66-67). Claimant clarified that it was his right arm that was injured and confirmed that he is right-handed. Claimant testified that he was currently experiencing pain in the form of burning in his entire arm and stated that his physicians told him that he had a first-degree separation. (TR. at 67).

Dr. Mantone released Claimant to perform light-duty work following the accident. According to Claimant, he sat in the carpentry shop for eight hours per day and did no work from October 25 or October 26, 2002, until December 23, 2002. (TR. at 67-68). Prior to December 23, Dr. Mantone had sent him for a cortisone shot, which caused swelling and pressure in his

back. On December 23, Claimant telephoned Dr. Mantone's office, spoke with the nurse, and made an appointment to see Dr. Mantone on January 9, 2003. (TR. at 69-70). That day, Dr. Mantone completed an out-of-work form covering the dates December 23, 2002, through January 9, 2003. (TR. at 70). However, Claimant later testified that Dr. Mantone was on vacation from December 23, 2002, until January 9, 2003. (TR. at 90).

After speaking with Dr. Mantone's office, Claimant testified that he told Mr. Bowman Davis, the facility supervisor, that he was leaving because of the pain caused by the cortisone shot and that Dr. Mantone's nurse would fax the out-of-work form. (TR. at 71, 95). Claimant stated that he did not tell Mr. Davis that he was quitting. (TR. at 90).

Claimant saw Dr. Mantone on January 9, 2003, who told him not to return to work until he was seen by Dr. Carlson. Claimant did not recall if he also saw a rehabilitation nurse at that time. (TR. at 71-72). When shown Claimant's Exhibit 10, page 17, an office note from Dr. Mantone, dated January 9, 2003, stating "sedentary desk job, no prolonged standing on hard surfaces," Claimant stated he did not see that note until sometime in April, 2003. (TR. at 73-75, 103). He never received a telephone call from Employer telling him he was released to perform light-duty work. (TR. at 75). Claimant saw Dr. Carlson on January 31, 2003, who told Claimant he could return to work on February 3, 2003. (TR. at 75, 91).

On February 3, 2003, Claimant attempted to go back to work. (TR. at 75). After clocking in, he spoke to Mr. Davis and told him about his light-duty restrictions. However, Mr. Davis told him that his job had been filled, and he could not be rehired at that time. (TR. at 75-76). Since then, Claimant has not been offered a light-duty job by Employer. (TR. at 76).

Claimant testified that he continued treatment with Dr. Carlson, and in March, 2003, Dr. Carlson referred him to a pain specialist, Dr. Jerry Smith, with whom Claimant treated for a short time. (TR. at 76). Dr. Carlson first released Claimant to full-duty work on March 9, 2003. (TR. at 91).[2] Claimant also had 2 MRIs performed, one on his neck and one on his shoulder, which Claimant testified came back normal. He also had a nerve conduction study performed in January, which came back normal. (TR. at 93). Claimant returned to see Dr. Carlson on or about May 6, 2003, and told Dr. Carlson that he wanted to return to full-duty work after an injection in his right shoulder. (TR. at 76). Claimant was released by Dr. Carlson to full-duty work on June 10, 2003. (TR. at 77, 92).

On June 20, 2003, Claimant returned to Dr. Carlson to ask for a permanent partial disability rating as he was under the impression that there was nothing else Dr. Carlson could do for him. Dr. Carlson sent Claimant for a functional capacity evaluation, which Claimant underwent in July, 2003. (TR. at 77). The results of the functional capacity test showed that Claimant had a 24% loss in his right arm and a 24% functioning loss in his right shoulder. The test also showed a 5% loss each in his cervical area and his neck, and an overall 18% loss in his

[2] Claimant's counsel stated he had no record that Claimant was being treated by Dr. Carlson at that time, but that the records he possessed showed that Claimant was being treated by Dr. Smith. Claimant testified that he did not remember if he saw Dr. Carlson in March, 2003. (TR. at 100). Upon questioning by the court, counsel for Employer stated that when he addressed this subject, he was referring to EX 6, a "Virginia Employer Commission physician's report," which showed dates of March 25, 2003, and March 9, 2003. (TR. at 100-01).

right arm. (TR. at 77). Claimant has continued treating with physicians since July, 2003. He has seen Dr. Ross, whose office is in the same facility as Dr. Smith, for rehabilitation. (TR. at 80). He did not return to Dr. Smith because he felt that Dr. Smith was not doing anything for him. He hoped that Dr. Ross would set him up with some type of physical therapy. (TR. at 94). Claimant was not aware of what finding Dr. Ross made during his last visit because the diagnosis was not ready when he was at the doctor's office the previous week. (TR. at 94-95). He was also not aware that Dr. Ross did not agree with the results of the functional capacity evaluation. (TR. at 95).

He was also told to see Dr. Carlson as needed. (TR. at 80). Claimant further stated that no physician has told him that he will need any type of operation. (TR. at 89). Claimant also testified that, at the request of Employer, he saw Dr. Kirven on October 6, 2003, at which time he told Dr. Kirven that he had broken his left arm. (TR. at 93).

Claimant understood that his restrictions were no lifting over thirty or forty pounds and no limit on bending, sitting, or squatting. Claimant testified that he is not able to return to his work as a carpenter for Employer under these restrictions, as the carpentry work requires lifting as much as one hundred pounds and holding on to scaffolding as he climbs and passes materials to other workers. (TR. at 78-79, 92).

Claimant worked as an automobile detailer from May 12, 2003, through June 10, 2003; while performing this job, he used his left hand. Claimant was laid off from this job, where he earned $6.25 per hour for forty hours per week. (TR. at 82-83). Claimant testified that he began working with Parks Contracting on October 27, 2003, as an estimator on storm-damaged homes in the Williamsburg, Virginia, area. (TR. at 81). Claimant testified that he was not an employee of Parks Contracting, but that he receives a Form 1099 tax form at the end of the year. (TR. at 89). As an estimator, he determines the number of hours a repair job will take, the amounts of materials that will be needed, and where the materials will be purchased. (TR. at 81). He earns six dollars per hour and works forty hours per week. (TR. at 82). He does not receive any bonuses in addition to his hourly wage, and he has never discussed bonuses with the contractor. (TR. at 89-90). Claimant has never worked as an estimator before, but stated that his knowledge of the job comes from his experience as a carpenter. (TR. at 90).

Claimant has worked no other jobs nor earned any other money since December 23, 2002; he has not turned down any jobs since that time either. Claimant is still a union carpenter, as he has been for fifteen years, and has attempted to get work through the union. The only job that the union has sent him to was a foreman's job, as he had previous experience being a foreman. (TR. at 86-87). As a foreman, he would not be required to lift anything heavy; instead, he would read plans and direct the carpenters on the job. (TR. at 87). According to Claimant, foreman jobs are difficult to find in Virginia. (TR. at 87).

At the time of the hearing, Claimant was experiencing burning on the inside of his arm, around his AC joint and into his neck. He also stated that he has a "hard time turning completely to the right like I used to do. When I'm backing up the car, I have a hard time." (TR. at 83). Claimant also testified that he injured his left arm while helping a friend, with whom he was living, pick up some trees after the hurricane in September, 2003. One tree hit his left arm and

broke it; Claimant stated that he now has a steel plate in that arm. (TR. at 83-84). Claimant testified on cross-examination that the tree weighed thirty to forty pounds and that he used both hands to pick up the tree. He was not getting paid to help his friend with the yard work nor was doing yard work part of his living arrangement with his friend. (TR. at 85).

Testimony of Warren Rosier, Supervisor for Employer

Mr. Warren Rosier is a field supervisor for Employer and has been employed in that position for eight to ten years at the Yorktown Refinery, which is owned by Giants Industry. (TR. at 18, 31). As a field supervisor, Mr. Rosier's duties include coordinating the crafts, such as carpenters, boilermakers, and pipefitters, assigning the jobs, and ordering materials for the various jobs. (TR. at 19). Employer has a contract with the refinery to provide in-plant maintenance. (TR. at 30). Mr. Rosier testified that he was familiar with Claimant and that Claimant worked for Employer "a couple years or more. I don't remember exactly right off, but it was a long time." (TR. at 19-20).

According to Mr. Rosier, Claimant's carpentry duties included building scaffolds and forms, and replacing doors. The scaffolding was used for various reasons, including new construction, putting in or insulating lines (including pipelines), repairing line leaks, running electrical conduit, and to support the various other crafts at the refinery. (TR. at 20-21, 23). Mr. Rosier clarified that the carpenters do not actually make repairs to the lines, but instead erect scaffolding so that whoever makes the repairs can do so; this is the largest portion of the carpenters' work. (TR. at 21, 34, 40). The scaffolding built to repair pipelines is "one of the main jobs for a carpenter." (TR. at 21). The scaffolding is kept in two storage areas; one is located in close proximity to the dock, and the other is close to the main carpentry shop. (TR. at 51). Mr. Rosier identified these two areas on a map marked as EX 2. (TR. at 53).

Some pipelines carry crude oil, which is brought in on barges and large ships, and run from the docks to storage tanks that are located a mile or more from the docks, Mr. Rosier testified. (TR. at 21-22, 31). A system of pipelines and pumps move the crude oil from the tanks through the refining process. (TR. at 32). Other pipelines carry different types of water. (TR. at 32-33). According to Mr. Rosier, approximately ninety percent of the pipes are used as part of the refining process, and about eighty percent of a carpenter's time is spent building scaffolding to repair these pipes. (TR. at 34-35). Claimant never participated in the loading or the unloading of the ships. (TR. at 40).

When asked to provide an estimate of how much of Claimant's time was spent working in the areas related to the first part of the refining process, which was described as from the docks to the point that the crude oil entered the tanks, Mr. Rosier stated that Claimant spent ten to fifteen percent of his time performing work involving these functions. (TR. at 47-48, 59). Although Mr. Rosier had not examined any records in devising this estimate, he states that there are only four carpenters, so Claimant would have been involved in work on the piers, especially that which requires three to four people. (TR. at 59).

Claimant would also build forms for concrete platforms on which pumps that bring the oil off the ships are located. There are pumps located in various places at the refinery. (TR. at

22-23). Most of these pumps "have nothing to do with the loading and unloading of the ships." (TR. at 40-41). Forms are also built so that a concrete wall by the docks, which serves as a "break wall," can be repaired and reinforced. (TR. at 29). According to Mr. Rosier, this wall keeps the soil around the pier from eroding; he went on to state that if repairs were not made to the concrete break wall, the wall would fall, causing the pier to collapse. (TR. at 30). Claimant did not pour the concrete. (TR. at 59). Mr. Rosier estimated that ten to twenty percent of Claimant's time was spent building forms, a majority of which were for the refining process. Claimant also did various other maintenance jobs, such as repairing and replacing doors and windows, some of which are located in buildings that are on the piers. (TR. at 41, 57).

Claimant also made repairs to boards and handrails on the piers and docks. (TR. at 23). Scaffolding approximately twenty to thirty feet high is also built to get to the loading arm on the pier, which hooks onto the ships to unload the crude oil. Mr. Rosier testified that the universal joint on the loading arm had to be inspected yearly, as well as greased and repaired when needed. (TR. at 24-25). The scaffolding is removed after the necessary work or inspection is done to the loading arm because the loading arm cannot operate with the scaffolding in place. (TR. at 25).

Mr. Rosier testified that Claimant worked on the pier erecting scaffolding for the loading arm and crude lines and building forms at least ten to twelve times. (TR. at 36-37, 39). Mr. Rosier stated that he did not remember the specific dates that Claimant worked on the piers, but he "remember[ed] two or three times, I mean right off. I remember him working out there. . . . I remember several times he was erecting scaffolding." (TR. at 37-38). Mr. Rosier later clarified that part of the ten to twelve times he was on the pier was spent repairing boards on the pier. (TR. at 41-42). Prior to testifying, Mr. Rosier did not review any records or work orders that showed where Claimant worked while employed with Employer. (TR. at 42-43). Mr. Bowman Davis also has access to these records. (TR. at 56).

Mr. Rosier stated that the refinery is enclosed by fencing, and there are no public streets or facilities on the premises. Individuals enter and exit through a main gate. Craftspeople park outside the main gate and use a badge to enter and exit the facilities.[3] (TR. at 25-26). Employer maintains an office at the refinery. (TR. at 26).

Mr. Rosier was aware that Claimant suffered an on-the-job injury while working at the coker unit on October 25, 2002. (TR. at 26, 44). According to Mr. Rosier, this location was approximately 1 1/4 to 1 3/8 miles from the dock. (TR. at 44). Including in this estimate is the approximate three thousand-foot length of the pier itself. (TR. at 58). At the time of the accident, Claimant "was erecting a scaffold for a leak on a water line." (TR. at 45). The water in the line is used to cool the coker oven, which is at the end of the refining process. (TR. at 46-47). This was the only work that Claimant did on the day he was injured. (TR. at 49).

When Claimant returned to work, he performed a light-duty job, and Mr. Rosier remained his supervisor during that time. (TR. at 26-27). Specifically, Claimant was working in the carpentry shop performing cleaning duties for eight hours per day. (TR. at 27-28). Mr. Rosier testified that "we had him in the shop, you know, doing different things, various things in the shop. Kind of hanging out, to be honest with you, until he got back on his feet. You know,

[3] Mr. Rosier identified the parking area on a map marked as EX 2. (TR. at 52).

taking care of him." (TR. at 27). According to Mr. Rosier, there is not a full-time position for shop clean-up, but that the carpenters usually cleaned and organized the shop. (TR. at 28).

Mr. Rosier stated that Claimant left on or about December 23, 2002, and he was replaced approximately one week later by an individual to perform the job that Claimant did before he was injured. (TR. at 28-29). No one has been hired to perform the shop clean-up duties that Claimant performed during the period prior to December 23, 2002. (TR. at 29).

Testimony of Bowman Davis, Project Manager

Mr. Bowman Davis is employed as a project manager for Employer and has been employed in that position since March, 1995. (TR. at 104-05). As project manager, Mr. Davis's duty is to manage all of the work assigned to Employer by Giants Industry, which owns the Yorktown, Virginia, oil refining facility. Employer is contracted to perform maintenance and renovation services to the facility. Employer does not have a contract to load or unload ships and has no employees that engage in these activities. (TR. at 105). According to Mr. Davis, all of the employees who load or unload ships are employees of Giants Industries, and if a ship comes in to be unloaded, Employer's employees must leave the docks. (TR. at 106).

As project manager, Mr. Davis sometimes spends all day in his office doing paperwork. He stated that Mr. Rosier is more familiar with what goes on in the field, but that he [Mr. Davis] tries to go out and check on activities. (TR. at 122). Mr. Rosier has a better "realtime" understanding of who is performing what duties, but throughout the course of the week, Mr. Davis stated he personally knows what the workers are doing. (TR. at 123).

Mr. Davis stated that Claimant was employed as a union carpenter under his supervision from either July or August, 1997, through December 23, 2002. (TR. at 107-08). The primary job of carpenters was to build scaffolding; the carpenters spent, in Mr. Davis's estimation, ninety to ninety-five percent of their time performing this task in various parts of the Yorktown facility. (TR. at 108-09). Of that ninety to ninety-five percent, Mr. Davis estimated that "almost all of" the time was spent on tasks related to the refining aspect of the facility. (TR. at 109). Mr. Davis stated that approximately five percent of Claimant's jobs related to the first part of the refining process, defined as the crude oil coming off of the ships until it reaches the storage tanks. (TR. at 111).

Mr. Davis also estimated that while Claimant was employed with Employer, Claimant built scaffolding on the docks five to ten times per year, and that sometimes this scaffolding would relate to pipelines that had nothing to do with the loading or unloading process. (TR. at 109-10). With regard to the testimony about forms built by the carpenters, Mr. Davis stated that these forms were related to the refining process. According to Mr. Davis, Claimant never repaired any equipment, pipes, or lines anywhere in the facility. (TR. at 111, 126). Mr. Davis testified that the concrete wall that Mr. Rosier spoke of is in place to prevent erosion and serves no purpose in the loading or unloading of ships. (TR. at 107, 118). However, he went on to testify that if the wall was not maintained, the pier would eventually fall into the water; therefore, it needed to be maintained. (TR. at 119). Mr. Davis also stated that many of the pipes that run from the piers are not used or related to the loading or unloading function. (TR. at 107).

Upon cross-examination, Mr. Davis was questioned as to the function of the loading arm on the pier. He stated that he understood that it facilitates the piping when crude oil is pumped on or off of the ships, and that he believed that the crude oil could be loaded or unloaded without the loading arm but that he did not know for sure. (TR. at 115-16). Mr. Davis further testified that the loading arm needed to be maintained to load or unload ships. (TR. at 116). Claimant never made repairs to the loading arm. (TR. at 126).

According to Mr. Davis, the ships could be loaded and unloaded even if the pier was not maintained "if they really wanted to," though it is easier and safer with a pier. Maintenance of the pier also facilitates the loading and unloading of the ships. (TR. at 116-17). Employer supplies carpenters to build scaffolding so that the pier as well as the pipes that move crude oil to and from the ships can be maintained, Mr. Davis testified. (TR. at 117-18). Mr. Davis stated that the refinery is not set up to remove crude oil from ships without a network of pipelines in place. (TR. at 118). Mr. Davis stated that "indirectly," the pipes, the loading arm, and the bulkhead were necessary for the loading and unloading process, and when viewed in this manner, Claimant still only spent five percent of his time on activities related to the loading and unloading. (TR. at 125-26). Even if he were told that, as a matter of law, the pipes, the structures on which the pipes run, and the maintenance of these pipes were considered part of the unloading process, Mr. Davis still opined that Claimant spent five percent of his time working on unloading functions. (TR. at 127).

Mr. Davis understood that Claimant's accident occurred near the coker unit. (TR. at 106). Prior to Claimant's accident, Mr. Davis testified that Claimant was a good employee, and that after he was injured, it "surprised" him that Claimant did not go into the field to work. (TR. at 124-25). Mr. Davis was asked by Claimant's counsel specifically what light-duty work Claimant was doing in November and December, 2002:

Answer: I don't know what he was doing, practically nothing.

Question: And why was that?

Answer: Because he didn't want to.

Question: Did you make him do any work?

Answer: Well, I did finally say something about putting him to work and I think that's when he decided he was leaving

Question: Did you tell him to do any work?

Answer: I told him that we had an inspection and he could do safety launches. We use different people to do safety launches, or whatever.

Question: Did you have him do that?

Answer: He didn't want to.

Question: So you just left him sitting in a storeroom somewhere?

Answer: Well, it's not a storeroom, it's a shop.

Question: And how long did that go on for?

Answer: Weeks.

(TR. at 121-22).

Mr. Davis also testified as to why the light-duty work was made available to Claimant:

> [B]because I wanted him to stay on the payroll. . . . [I]f somebody gets hurt and they're still in the refinery, where they're still, where I have some control, I can make things happen. In fact, I set up some doctor appointments for him. I even went with him a few times. So I wanted to make sure the people are taken care of. I know what happens when they get out of the system and they get where they are more or less left on their own.

(TR. at 124).

Mr. Davis had a conversation with Claimant regarding this work on December 23, 2002. Mr. Davis testified that Claimant told him he did not want to continue his light-duty work, and that Dr. Mantone would be sending him a note taking him off the job. (TR. at 111-12). According to Mr. Davis, Claimant stated that "he was in a lot of pain and he just was tired of what he was doing, it was boring." (TR. at 112). Mr. Davis stated that Claimant "was saying that, you know, he was having pain. I said, well, if you leave the job, the pain won't go away. Try to, you know, work this through with the doctors and he said, well, he just couldn't take it anymore, the light duty." (TR. at 112). Mr. Davis went on to testify that "I took it [Claimant's statements] to mean that he was leaving because he didn't want to do light-duty work." (TR. at 113). When further questioned as to whether he recalled what Claimant actually said, Mr. Davis replied, "[H]e indicated that he was having pain, he didn't feel he was making any progress and he was bored with the light-duty. Basically that was the gist of the conversation." (TR. at 113). Mr. Davis took Claimant's statements to mean that Claimant was quitting the job. (TR. at 114).

Mr. Davis stated that he did not recall receiving a medical slip from Claimant, but that he could not say with certainty whether he did or did not. (TR. at 114, 119). Mr. Davis testified that he did not recall seeing Claimant's Exhibit 10, page 13, a note from Dr. Mantone covering December 23, 2002, through January 9, 2003. (TR. at 129-30). When he was shown the light-duty slip from Dr. Mantone (EX 5, at 3), Mr. Davis also said that he was not certain whether he had seen that slip before. (TR. at 120). Mr. Davis spoke with a Ms. Gustafan, who was a rehabilitation nurse hired by the insurance company, three or four times, and she informed him sometime after December 23, 2002, that Claimant was released to light-duty work. (TR. at 120-21). Mr. Davis never called Claimant to relate this information to him. (TR. at 121).

Claimant returned to talk to Mr. Davis on or around February 3, 2003, and indicated at that time he could return to light-duty work. Mr. Davis told Claimant that he did not have a light-duty job available and could only hire him back if he needed someone, and Claimant was referred by him to the union hall. (TR. at 114-15). Mr. Davis filled Claimant's pre-injury full-duty position because "we had work coming up and preparing for a turnaround and I needed people. I needed people that would work." (TR. at 114, 128). When he called the union hall to inquire about Claimant's status, he was told that Claimant was still on light-duty. (TR. at 115).

Mr. Davis testified that if Claimant had not left on December 23, 2002, he would have eventually hired someone, but would not have necessarily hired someone so quickly. He estimated that he would have hired someone around the first of the year because "[w]e had a turnaround coming up and scaffolding work was involved. Before I hire anybody I have to get the client's okay." (TR. at 128). Mr. Davis did not believe that as of December 23, 2002, Claimant should have been performing light-duty work and went on to testify that "We were prepared to keep him on light-duty going indefinitely." (TR. at 129).

Coverage

To be entitled to compensation under the Act, Claimant must initially establish that his injury falls within the coverage of the Act. The 1972 amendments to the Act added the requirement of the employee's status to the coverage analysis, which had previously focused only on the situs of the injury. Therefore, for a claim to be covered under the Act, a claimant must establish both that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by §3(a), and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a) (2002); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 299, 313 (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73-74 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977). For coverage to exist, then, a claimant must satisfy both the "status" and "situs" requirements of the Act. *Perini*, 459 U.S. at 313. The parties in the instant matter dispute whether Claimant is covered under the Act.

While the Fourth Circuit Court of Appeals has not directly addressed the matter, the Benefits Review Board has consistently held that the Section 20(a) presumption does not apply to the coverage requirements of the Act. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21, 23 (2002); *Stone v. Ingalls Shipbuilding Inc.*, 30 BRBS 209, 210 n.3 (1996); *Davis v. Doran Co. of Calif.*, 20 BRBS 121, 123 fn.1 (1987), *aff'd*, 865 F.2d 1257 (4th Cir. 1989) (unpublished). Claimant must therefore prove that he was engaging in an activity under Section 2(3) that was "integral or essential" to the loading, unloading, constructing, or repairing of a vessel, since his job does not specifically fall into one of the categories enumerated by that section. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-24 (1985). Claimant must also prove that his injury occurred at a qualifying situs.

The Status Test

The status requirement of the Act is occupational in nature. As interpreted by the courts, the status requirement ensures that the Act covers only those people who "spend at least some of their time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273. In so holding, the Court in *Caputo* expressly rejected the "moment of injury" test, instead finding that a claimant need not be engaged in maritime employment at the time of injury to be covered by the Act. *Id*. at 266 fn.27. "Section 2(3) restricts the scope of coverage by . . . requiring that the injured worker must have been engaged in 'maritime employment'" *Pfeiffer*, 444 U.S. at 78. Section 2(3) defines employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. §902(3) (2002). Section 2(3) also contains certain exclusions to coverage, such as "office clerical, secretarial, security, or data processing work;" "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;" and "aquaculture workers." *Id*. §§902(3)(A)-(B), (F).

There is no statutory definition of "maritime employment"; the courts, however, have addressed this term. The Supreme Court has held that land-based claimants at a relevant situs who are engaged in an activity that is an integral or essential part of loading, unloading, construction, or repairing a vessel are covered under the Act. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46-47 (1989); *Caputo*, 432 U.S. at 267. The Court has also held that workers "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act" even though they were not performing work essential to the loading process when they were actually injured. *Schwalb*, 493 U.S. at 47. In *Schwalb*, the Court further noted, "[i]t is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship." *Id.* The *Schwalb* Court found that "[t]he determinative consideration is that the ship loading process could not continue"; therefore, "[e]quipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work," and as a result, these functions are covered by the Act. *Id*. at 48. The Fourth Circuit**,** in *In Re CSX Transportation, Inc*., 151 F.3d 164 (4th Cir. 1998), held that a worker who engages in unloading activity fifteen percent of the time, but was not engaged in maritime activity at the time of his injury, is nevertheless "covered" under the Act, as the status test looks to whether the employee's occupation at the time of injury was "maritime." *Id*. at 171. The Benefits Review Board has also held that once cargo exits "maritime commerce," its transport inland is not a covered employment under the Act. *Zube v. Sun Ref. & Mktg. Co.*, 31 BRBS 50, 53 (1997) (while the movement of petroleum products between a barge and storage tanks is covered, the cargo's movement between the tanks and a tanker truck for transport to service stations is land transportation and not covered).

The Act also does not contain a definition for "harbor-worker," but again the courts have addressed this term. The term "harbor-worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." *Hurston v. McGray Constr. Co*., 29 BRBS 127, 129 (1995); *Stewart v. Brown & Root,*

Inc., 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980).

The Board and the courts have also addressed the use of non-maritime skills on a maritime project. The Fourth Circuit found in *White v. Newport News Shipbuilding & Dry Dock Co*., 633 F.2d 1070 (4th Cir. 1980), that it is immaterial that the skills used by employee, in that case a claimant who sorted and marked pipe to be used in shipbuilding, are essentially non-maritime in character if the purpose of the work is maritime. *Id*. at 1074 (finding that the function of affixing a color code to pieces of pipe to identify it for pipe fabricators constituted an integral part of the shipbuilding process such that the claimant was engaged in maritime employment and entitled to status under the Act). The Fifth Circuit held in *Hullinghorst Industries v. Carroll*, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), that non-maritime skills applied to a maritime project are maritime for purposes of the status test under the Act. *Id.* at 756. In *Hullinghorst Industries*, the Fifth Circuit found that the claimant, a carpenter who was injured while erecting scaffolding beneath a pier, was engaged in maritime activity because erecting the scaffolding was "an essential and indispensable step in the repairs to be effected" and "directly furthered the maritime goals of the . . . port facility [in] loading and unloading of ships." *Id.* at 752, 756. The Board has held that work of constructing, repairing, and maintaining pipelines on a pier needed to carry fuel, water, and steam to the vessels docked at a naval pier was integrally related to the loading and unloading process; without these pipes the fuel, water, electricity, and steam could not be loaded onto ships. *Simonds v. Pittman Mech. Contractors, Inc.*, 27 BRBS 120, 124 (1993), *aff'd*, 35 F.3d 122 (4th Cir. 1994).

The Situs Test

The second prong of coverage is the situs test, which refers to the place where the employee was injured. Section 3(a) of the Act defines situs as including navigable waters and "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a) (2002). In *Sidwell v. Express Container Services, Inc*., 71 F.3d 1134 (4th Cir. 1995), the Fourth Circuit adopted a plain language analysis of the situs requirement, holding that "an area is 'adjoining' navigable waters only if it 'adjoins' navigable waters, that is, if it is 'contiguous with' or otherwise 'touches' such waters. If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." *Id*. at 1138-39. When referring to an "area," the court clarified that it was referring to a "parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured." *Id*. at 1140 fn.11. "The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act." *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir.1998).

Analysis

Claimant argues in his post-hearing brief that his duties as a carpenter were both maritime in nature and integral to the loading and unloading process. (Claimant's Brief, at 15). Claimant cites the fact that he spent a portion of his time building scaffolding to allow other workers to reach the various pipelines, some of which carried oil between the ships and the refinery; that he

built scaffolding to enable workers to reach storage tanks and the loading arm on the pier; that he replaced dock boards and handrailing; and that he built forms for new pump foundations. (Claimant's Brief, at 14-16). Claimant also cites to the testimony of Mr. Davis, who stated that the piers were necessary in the loading and unloading process, and if the piers were not maintained, the ships could not unload the crude oil. As stated by Mr. Davis, if the pipes were not maintained, the crude oil could not be loaded or unloaded. (Claimant's Brief, at 16).

In support of his argument, Claimant cites to *Williams v. UEC Catalytic*, ALJ No. 1997-LHC-00086 (Oct. 24, 1997), decided by Administrative Law Judge Campbell of this office. According to Claimant, in this case, the claimant worked as a boilermaker at the same facility, the Yorktown Refinery, and Judge Campbell found that the claimant had regular duties of maintaining and repairing oil tanks, which was a necessary procedure to unloading the ships. Therefore, the claimant was found to have met the status requirement. (Claimant's Brief, at 17).

Claimant also cites to *Weyher/Livsey Constr. v. Prevetire*, 27 F.3d 985 (4th Cir. 1994), and *Graziano v. General Dynamics Corp*., 663 F.2d 340 (1st Cir. 1981), asserting that, like in *Graziano*, his work is also a "necessary link in the chain of work," since the piers are necessary for loading and unloading the ships. (Claimant's Brief, at 17-18). Claimant also argues that his title of "carpenter" alone should not preclude coverage under the Act, as the Board has even found the position of truck driver to be covered employment. (Claimant's Brief, at 18 (citing *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999)). Claimant maintains the same approach taken in *Gavranovic* should be applied in the instant matter because the building of scaffolding and upkeep of the pipelines were part of ensuring that the loading and unloading process went smoothly. If Claimant had failed to perform his duties, he argues, the refinery process would "inevitably" fail and the loading and unloading process would "cease completely." (Claimant's Brief, at 19). Because his work was critical to the loading and unloading part of the refinery process, Claimant argues that his work was maritime in nature. (Claimant's Brief, at 21).

Employer argues in its post-hearing brief that Claimant does not meet the status requirement necessary to avail himself of coverage under the Act, likening Claimant's circumstances to that of the claimant in *Herb's Welding*, where the Supreme Court held that the claimant did not engage in "inherently maritime" activities when he built and maintained pipelines on offshore oil rigs. (Employer's Brief, at 13). Employer argues that Claimant's similar duty of erecting scaffolding was merely maintenance work to allow other workers to actually make repairs to the refining equipment. (Employer's Brief, at 13). Claimant has not established that his duties were integral or essential to the loading or unloading process, Employer asserts, because erecting the scaffolding had nothing to do with loading or unloading the ships. (Employer's Brief, at 14).

In support of this argument, Employer cites to Mr. Davis's testimony that many of the pipes at the refining facility do not relate to the loading or unloading of crude oil. (Employer's Brief, at 13). Employer also recounts Mr. Rosier's testimony that Claimant spent only ten to fifteen percent of his time in areas related to the refining process; the fact that Mr. Rosier estimated that Claimant erected scaffolding on the pier only ten to twelve times; and that Mr. Rosier could only specifically recall two or three times that Claimant did work on the pier.

(Employer's Brief, at 13-14). Finally, Employer highlights the fact that Claimant did not recall specific locations and dates he performed work in each of those locations at the refinery, and that Claimant admitted that he sometimes erecting scaffolding to enable other workers to reach pipes that had nothing to do with the loading or unloading process. (Employer's Brief, at 14).

Based upon the testimony and evidence presented, I find that Claimant's duties as a carpenter included building scaffolding to allow workers in other crafts to reach different kinds of pipelines, the loading arm on the pier, and the storage tanks. (TR. at 21-25, 29-30, 63-65, 96-98, 108-10). I also find that he replaced boards and handrailing on the dock and built form work for the "break wall" and for concrete platforms for oil pumps. (TR. at 20-23, 29, 63). Mr. Rosier testified that if break walls were not built and repaired, the soil around the piers would eventually erode and cause the piers to collapse; Mr. Davis concurred. (TR. at 30, 107, 118-19). I also find that neither Claimant nor other employees of Employer were ever directly involved in the loading or unloading processes, nor did any of Employer's employees ever repair the pipelines themselves. (TR. at 21, 34, 40, 96, 106, 111).

The testimony of Claimant, Mr. Rosier, and Mr. Davis conflict as to the amount of time Claimant spent performing duties related to the unloading of crude oil from the ships, described as the functions occurring between the piers until the time the oil reaches the storage tanks. Claimant testified that he spent approximately fifteen to twenty percent of his time performing tasks related to this function, whereas Mr. Rosier testified that Claimant spent ten to fifteen percent of his time performing work related to the unloading of the crude oil. (TR. at 47-48, 59, 66). However, Mr. Davis testified that Claimant spent only five percent of his time on activities relating to unloading the crude oil, even if he were told that as a matter of law that the pipes, the structures on which the pipes run, and the maintenance of these pipes were all considered part of the unloading process. (TR. at 111, 127).

Upon consideration of these findings, I conclude that Claimant did spend at least some of his time in indisputably longshoring operations. Claimant's activities as a carpenter involved, as in *Hullinghorst Industries v. Carroll*, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the repair and maintenance of docks and piers, duties which the Board has found define "harbor-worker," one of the types of maritime employment. In accordance with past decisions by the Fourth Circuit, it is immaterial that Claimant was engaged in the use of a non-maritime skill (carpentry) on a maritime project. Much like the Fifth Circuit found in *Hullinghorst Industries*, I find that by using his carpentry skills, Claimant was engaged in maritime employment. Erecting scaffolding to reach such locations as the loading arm and pipelines; repairing boards on the docks; and building forms so that the break wall could be maintained, constituted "an essential and indispensable step in the repairs to be effected," "directly furthered the maritime goals" of the refinery in loading and unloading the crude oil from the ships, and were necessary for the maintenance of the docks and piers. *Id*. at 752, 756. As Mr. Rosier and Mr. Davis testified, the maintenance to the break wall was necessary to keep the soil around the pier from eroding, which would in turn cause the pier to collapse. (TR. at 30, 107, 118-19). The loading arm is also necessary to the loading and unloading process, and Claimant's work was essential in enabling other trades to make repairs to this and other parts of the facility that load and unload crude oil and products.

To be sure, at the time of injury, Claimant was not engaged in maritime employment, as he was erecting scaffolding to enable other workers to reach pipelines that carried water used to cool the coker unit, which Mr. Rosier noted was at the end of the refining process. (TR. at 45-47). However, the Supreme Court clearly renounced the moment of injury test in *Caputo*, and therefore, I must look to Claimant's occupation, not just the task(s) in which he was engaged, at the time of the injury.

The testimony reveals that Claimant spent at least fifteen percent of his time performing activities relating to these loading and unloading processes, which is sufficient to meet the threshold that he spent "some of his time" in indisputably longshoring operations. I accept the testimony of Claimant and Mr. Rosier and reject the testimony of Mr. Davis on this issue. Mr. Davis gave an initial estimation as to the amount of time that Claimant spent on tasks relating to the unloading and loading process of five percent. When he was asked a second time to give an estimate as to the time Claimant spent specifically on tasks related to the processes between the piers to the storage tanks, Mr. Davis maintained his estimate. In my assessment of Mr. Davis's testimony, it appears that Mr. Davis was either unable or unwilling to alter his opinion even when asked to take into account a viewpoint different from his own. Further, Mr. Rosier, as Claimant's direct field supervisor, had at least as much or more knowledge as to the jobs Claimant performed on a daily basis. For these reasons, I reject Mr. Davis's testimony and find that the estimations provided by Claimant and Mr. Rosier are more credible. Therefore, based upon these findings, I conclude that Claimant meets the requisite status under the Act. The discussion must now turn to whether claimant was injured at a covered situs, so as to be a covered employee under the Act.

At the time of his injury, Claimant testified, and it is undisputed, that Claimant was erecting scaffolding to enable workers to reach a pipeline located at the coker unit. (TR. at 66-67). The evidence also includes an aerial map of the facility where Claimant was working at the time of his injury. (EX 2). During his testimony, Mr. Rosier identified certain areas on the map, such as the entrance and the scaffolding storage areas, in addition to those already marked for reference on the map. (TR. at 26, 51, 53). Mr. Rosier also testified that the refinery is enclosed by fencing, and there are no public streets or facilities on the premises. (TR. at 25-26).

Based upon the testimony and evidence, I find that Claimant was injured in a location that qualifies as a covered situs under the Act. Under the Fourth Circuit's plain language analysis of the situs requirement, the testimony and the aerial map clearly show that the coker unit is located within the confines of the refinery and that the refinery adjoins and is contiguous to navigable waters (the York River), as mandated by the Fourth Circuit in *Sidwell* and *Brickhouse*. The map and testimony also confirm that the refinery is a premises enclosed by fencing, and that there are no public roads within the facility or separating the facility from the navigable waters of the York River. Therefore, I find that Claimant has met the requirements for status and situs so as to be a covered employee under the Act. I will now determine whether Claimant is entitled to temporary disability compensation.

Temporary Disability

Medical Evidence

Claimant was treated in the emergency room at Mary Immaculate Hospital in Newport News, Virginia, on October 26, 2002, following his injury on October 25, 2002. (CX 9-1; EX 4-1, 4-2). Claimant was X-rayed, and was diagnosed with an "AC separation, 1st degree." Claimant was given a prescription and a shoulder immobilizer, and was told not to return to work until he was seen by a Dr. Felder, who according to the notes is an occupational medicine doctor. The Occupational Medicine Return to Work form was completed Nurse C. Morgan. (CX 9-1; EX 4-2).

An X-ray interpretation of the X-ray taken at Mary Immaculate Hospital was interpreted by Dr. Daniel Radack on October 26, 2002. (EX 4-1). Dr. Radack noted that he saw "minimal separation at the acromioclavicular joint compatible with a first degree acromioclavicular separation." He also noted that "[t]he glenohumeral joint is intact. Osseous mineralization is normal." He found no evidence of a fracture. Dr. Radack's impression from the X-ray was "Probably first degree of acromioclavicular joint separation. Clinical correlation recommended." (EX 4-1).

A prescription form was completed and dated October 29, 2002, and notes "2 AC sep. rule strain/contusion No use R UE 3 wks." The signature is illegible, but the form is from Tidewater Orthopedic, where Dr. Mantone practices. (CX 10-14).

Another prescription form was completed and also dated October 29, 2002, which appears to prescribe Tylenol with codeine. The remainder of the form is illegible, as is the signature. Again, the form is from Tidewater Orthopedic. (CX 10-14).

Claimant was seen by Dr. James K. Mantone at Tidewater Orthopaedic Associates on November 4, 2002. Dr. Mantone notes that Claimant's employer requested that he evaluate Claimant's condition, as Claimant was complaining about numbness in his hands, particularly his right hand, and difficulty turning his head. Claimant related to Dr. Mantone that he had "a cold sensation in both hands, some numbness in the tips of his fingers, . . . [and] some difficulty in the right arm from axilla to the medial arm." Upon examination, Dr. Mantone found that Claimant's neck motion was "okay but irritable to the right" and that he was "tender over similar area at the paraspinal and trapezius medially." Dr. Mantone noted that "Spurling's and reverse Spurling's is negative" as was the C-spine compression test. Dr. Mantone found that Claimant's shoulder had "great range of motion and is nonirritable" and that Claimant was "nontender over the AC joint." Claimant's strength was noted as "excellent." (CX 10-1; EX 5-2(a)).

Claimant's sensory exam was abnormal; Claimant had pain "from the medial forearm, medial arm decreased to pin prick and light touch, right greater than left. It is in all fingers median and ulnar distribution. Radial distribution is somewhat equivocal." Dr. Mantone X-rayed Claimant, which revealed a "decrease in the normal cervical lordosis" and "some minimal disc space narrowing." He also found that "[a]t 4-5 and 5-6 there is a very slight posterior ridging but nothing to encroach upon the space available for cord on the plain films." (CX 10-2; EX 5-2(b)).

Dr. Mantone concluded that Claimant's symptoms seemed neurogenic, and that his neurologic exam was normal except for sensory disturbance. Dr. Mantone gave Claimant a Medrol Dosepak followed by Celebrex. Dr. Mantone also recommended an MRI. Dr. Mantone did "not see much in the way of AC separation symptomatically. Radiographically from projection they were relatively obscured by technique. Clinically they seem prominent with the right slightly more prominent than left." He suggested delaying therapy because Claimant told him things were better in his shoulder. Dr. Mantone did note "I think this was more just contusion/direct blow." Claimant was to return to see Dr. Mantone "following the study." (CX 10-2; EX 5-2(b)).

Dr. William C. Snyder of HealthSouth Diagnostic Center performed an MRI Cervical Spine without contras upon Claimant on November 13, 2002. Dr. Snyder noted Claimant's problems with right shoulder pain and bilateral hand numbness. Dr. Snyder found "mild straightening of the cervical lordosis" and "mild disc space height loss at the C5-6 level." Also at the C5-6 level, Dr. Snyder found "mild posterior vertebral ridging with disc bulge" which was "slightly eccentric to the left." He opined that "[t]his does not cause significant central stenosis." Dr. Snyder also found "mild neural foraminal narrowing and mild degenerative facet change present at the C5-6 level. At the C6-7 level, he found "slight disc bulge present with a tiny central protrusion. This has minimal mass effect on the anterior thecal sac but does not cause significant central or peripheral stenosis." (CX 10-9; EX 12-1).

Claimant saw Dr. Mantone on November 19, 2002, for a follow up visit. Claimant presented Dr. Mantone with the results of his MRI, and told Dr. Mantone that the Medrol Dosepak made him "better a little bit during the high dose period but then recurrence and continued symptoms." Claimant had pain lifting objects such as a jug of milk and noted that his neck pain was worse. Claimant exhibited concern about his shoulder because his AC joint and distal clavicle were more prominent on the right side. Dr. Mantone found that Claimant's physical condition was similar to his previous examination and that he had no tenderness in the AC joint. Claimant's neurological examination was normal, and his neck was slightly tender at the base. (CX 10-6; EX 5-3(a)). Dr. Mantone reviewed the MRI of the C-spine and found "mild posterior osteophytic ridging with disc bulge. The bulge is broad but eccentric to the left, not right more symptomatic side. There is mild foraminal narrowing from this again, more left than right. There is facet artrosis magnifying this as well." Dr. Mantone noted that at C6-7, there was a "very small central and slightly to the right disc bulge. It abuts the anterior thacal sac and slightly indents it." (CX 10-6; EX 5-3(a)).

In assessing his condition, Dr. Mantone noted that Claimant's symptoms were greater in his right side than in his left. Dr. Mantone wrote that Claimant noted his difficulty in lifting items, and at the same time wanting to return to work. Dr. Mantone believed that the MRI "fits with his historical complaints." Dr. Mantone opined that "I would go slow, even in the work environment, as [his complaints] may improve with time." (CX 10-6; EX 5-3(a)). Claimant was sent for physical therapy, and Dr. Mantone discussed with him the option of a trial cervical epidural at 5-6 and 6-7. Dr. Mantone also suggested that Claimant get a second opinion from either a shoulder expert, orthopedic surgeon, or a spine surgeon in light of his dissatisfaction with his progress. Dr. Mantone restricted Claimant from lifting at all with his right arm, and

permitted him to engage in desk work, paperwork, and planning of work. Dr. Mantone noted that he would see Claimant again in three to four weeks. (CX 10-7; EX 5-3(b)).

A prescription form from Tidewater Orthopedic is dated November 19, 2002. This form is basically illegible as is the signature. (CX 10-15).

Another prescription form from Tidewater Orthopedic is also dated November 19, 2002. This form notes "No lifting use R arm date paperwork, planning jobs ok." The signature is illegible. (CX 10-16; EX 5-1).

A form dated November 25, 2002, appears in the records from Dr. Pahnke's office as CX 12-3. The form contains numbers in the section marked "Neck, Palpation," "Neck, Active ROM," and Dynamometer. There is no explanation provided as to the meaning of the marks on this form. (CX 12-3).

A form dated November 25, 2002, appears in the records from Dr. Pahnke's office as CX 12-4. The form notes "History & Physical Examination; X-rays taken cervical; therapy applied EGS/ice cervical; ROF; [illegible]." Also, under the heading "Manipulation" someone has circled C1-3, C6-7, and T1. (CX 12-4).

Another form dated November 25, 2002, appears in the records from Dr. Pahnke's office. On this form, Claimant's complaint is noted as "HA; Neck pain; Rt. Shoulder pain." What appears to be "disc bulge" is written in the second column. The word "Adjust" is circled, and under "Therapy Recommended," "EGS/Ice" is written. There are several items circled in the first column: "AT; 5; 6; and Palpitation." There is no explanation provided as to the meaning of the marks on this form (CX 12-5).

A second area on the form entered into evidence and marked as CX 12-4 is dated November 26, 2002, is illegible except for where someone has circled EGS and CP and has also circled C2-5 and T1. (CX 12-4).

A third section on the form marked as CX 12-4 is dated November 27, 2002, and is also illegible except that the same items are circled in this section as in the preceding section. (CX 12-4).

Claimant saw Dr. Mantone on December 3, 2002, "ahead of schedule," as Dr. Mantone notes Claimant's continued difficulty in his neck. Claimant told the doctor that he was seeing a chiropractor and had a home traction unit, both of which made him feel better for an hour afterwards. Claimant also complained of morning stiffness and pain in his neck. His arm symptoms were similar to those he experienced previously, with pain and numbness in his hands. Claimant was continuing to take Vicodin as Dr. Mantone had previously prescribed. Claimant's physical examination was normal. Dr. Mantone was unable to appreciate the "clunking sensation at the trapezial ridge" that Claimant described. His AC joint was nontender with occasional crepitus, and Claimant's neck was still tender. Dr. Mantone noted Claimant's feeling that his symptoms were unchanged; Dr. Mantone discussed with him epidural versus foraminal injection. Dr. Mantone opined that an epidural was appropriate at 5-6 on both the right and left

sides, and probably also at 6-7. Dr. Mantone maintained Claimant's work restrictions from the previous visit. (CX 10-8; EX 5-4).

Dr. Mantone completed a "Return to Work or School" slip for Claimant on December 3, 2002, noting that he could return to work that day. His restrictions were noted as "continue previous restrictions until injection." (CX 10-12).

A prescription form from Tidewater Orthopedic is dated December 3, 2002. This form notes "cervical epidural---5/6 R/L ? foraminal R (6/7). The signature is illegible. (EX 5-1(b) (question mark in original)).

By letter dated December 6, 2002, Dr. Robert B. Pahnke of Pahnke Chiropractic & Wellness Care informed Employer that Claimant was first seen in that office on November 25, 2002. Upon examination, Dr. Pahnke found that Claimant was tender at C1 right, C5-6 right, and in the shoulder region. Claimant's cervical range of motion was restricted. Dr. Pahnke administered the Jackson's Cervical Compression test, which caused pain in the middle and right positions, which Dr. Pahnke wrote was indicative of nerve root compression. Dr. Pahnke also wrote that neurological findings indicated weakness in the cervical region. Upon X-raying Claimant, Dr. Pahnke noted that Claimant had a loss of normal A-P cervical curvature; a decreased range of movement, and fixation of C1-5 levels. (CX 12-1). Dr. Pahnke diagnosed Claimant with the following: (1) post-traumatic headaches; (2) cervical radiculitis; (3) cervical sprain/strain; (4) neck pain; (5) muscle spasms; (6) shoulder sprain/strain; and (7) shoulder pain. As to Claimant's treatment, Dr. Pahnke noted that Claimant had been started on a treatment regimen of three times per week, and that he would receive mild spinal manipulation to realign the vertebrae and reduce nerve root irritation. Claimant would also undergo electro-galvanic muscle stimulation and cold packs to reduce swelling. Dr. Pahnke noted that Claimant would be reevaluated after twelve visits. (CX 12-2).

A form dated December 9, 2002, appears in the records from Dr. Pahnke's office. In the top segment of the form, the following is written: "No change/having injection at hospital on Wed. N/C Rt. Arm pain & numbness persists." Also, EGS is circled, as is C1-3 and T2-5. (CX 12-6).

The second segment on the form entered as CX 12-6 is dated December 16, 2002. EGS and CP are circled, as are C1-4 and C6-7. Written on the form is "injection postponed until 20th. [remainder illegible]." (CX 12-6).

On December 18, 2002, Dr. Warren H. Foer performed a neurosurgical consultation on Claimant. Claimant complained of continuing pain in the posterior neck region, a burning and aching sensation in his neck and episodes of a "cold feeling" in his hands. Upon reviewing an MRI scan of Claimant's cervical spine, Dr. Foer found "minimal degenerative change with a minimal central disc protrusion at C6-7 and some vertebral ridging and mild disc bulge to the left at C5-6." (EX 11-1). Upon examining Claimant, Dr. Foer noted "no gibbus or deformity of the cervical spinous processes," "no paravertebral muscle swelling or spasm," and "no supra or intraclavicular fossa masses, tenderness or Tinel phenomena." Dr. Foer did note "some midline discomfort to palpation, particularly in the cervical-thoracic junction." Dr. Foer found neither

weakness in the upper or lower extremities nor any sensory abnormalities, nor did he find any surgical treatable lesion or any specific evidence of nerve root compression. Dr. Foer recommended an EMG and nerve conduction studies to help in further evaluation. (EX 11-1).

On December 20, 2002, Dr. Eric Dominguez administered to Claimant a cervical epidural steroid injection under fluoroscopic guidance including epidurogram. Dr. Dominguez noted Claimant's injury and that his complaints of bilateral neck and upper extremity pain, greater pain in his right side than in his left, and some numbness in the first three fingers on each hand. Upon examination, Dr. Dominguez noted that Claimant's "cervical range of motion is minimally limited secondary to soreness of the cervical spine." Dr. Dominguez noted a bulging disk at C4-5 and C5-6 in the cervical spine MRI. Dr. Dominguez explained the harmful effects of tobacco use on disc degeneration to Claimant, who he noted was a "45-pack-year" tobacco abuser. (CX 10-11, 14-1). Claimant was injected with 2cc of 1% lidocaine and 3 cc of Omnipaque 240. Dr. Dominguez noted that the injection of Omnipaque "revealed spread including segments of C7-T1, T1-T2, C6-C7 and C5-6. On the lateral projection there was spread as far as cephalad as the level of C3. There was a slight preferential spread to the right side." Claimant tolerated the procedural well, and was discharged without complications. (CX 10-11, 14-2).

In a letter dated December 20, 2002, and addressed to "To whom it may concern," Dr. Eric Dominguez wrote, "Mr. Timothy Long was at the Pain Clinic today for a therapeutic epidural steroid injection. I recommend 2-3 days of rest at home. He may return to work on Monday 12/23/02." (CX 14-4; EX 10-1).

On December 22, 2002, Dr. Michael J. Vogel, D.C. completed a certificate verifying that Claimant was under his care for "cervical sprain/strain and separated Rt A/C joint." Dr. Vogel also indicated that Claimant was restricted from using his right arm and shoulder until the X-rays confirmed that Claimant's right A/C joint is stable. (CX 15-1; EX 8-1).

A "Return to Work or School" slip for Claimant was completed by Dr. Mantone's office on December 23, 2002, noting that Claimant would be unable to return to work between December 23, 2002, and January 9, 2003, [4] and that he could return to work on January 10, 2003. Claimant's diagnosis was noted as "shoulder pain." (CX 10-13).

Claimant returned to see Dr. Mantone on January 9, 2003, for his neck and bilateral upper extremity difficulties. Claimant told Dr. Mantone that the cervical epidural injection he had approximately two weeks prior had worsened his symptoms. Claimant also awoke at 3:00 a.m. that morning with increased symptoms in his neck and pain in his arm. Claimant described the pain as muscle tightening along the trapezius, and also told Dr. Mantone that standing on concrete was bothersome and worsened his symptoms. (CX 10-3; EX 5-5(a)). Dr. Mantone again examined Claimant, noting that the C-spine exam was without positive compression test and slight positive Spurling's to the right. Dr. Mantone observed "mild trapezial spasm and slight thickening of the right trapezius" and "a little bit of prominence of the AC joint on the right which is completely nontender." He also noted that Claimant was not tender or irritable in this area. Dr. Mantone found "[s]ymmetric strength" in Claimant's upper extremities and no

[4] The January dates in this doctor's note contain the year 2002; however, I will assume that this is a scrivener's error that is meant to be 2003, as that date comports with the other medical and testimonial evidence in the record.

instability in the shoulder. He did, however, find "a little bit of posterior translation symmetrically at both sides with no crepitus and no causation of symptoms." (CX 10-3; EX 5-5(a)). Claimant's sensory exam was normal, his reflexes were "fine," and his grip strength "okay." (CX 10-4; EX 5-5(b)).

Dr. Mantone recommended not repeating the cervical epidural since Claimant had no relief following that procedure. Dr. Mantone suggested that Claimant's condition "may be traction type phenomena as well as direct blow. It may not be in the cervical spine and may be peripheral." Dr. Mantone also recommended an EMG nerve conduction velocity study "to assess for plexopathy or peripheral entrapment. He also filled out a work form for Claimant, finding that Claimant was unable to return to his regular job. (CX 10-4; EX 5-5(b)). Dr. Mantone also told Claimant that he was leaving the practice and suggested that he see one of the other physicians at Tidewater Orthopaedic Associates. Claimant was referred to Dr. Carlson for his ongoing pain. (CX 10-4; EX 5-5(b)).

In an addendum to his notes from the January 9, 2003, office visit by Claimant, Dr. Mantone noted that he [Dr. Mantone] spoke with Ms. Tere Gustafson, a case worker, who, according to Dr. Mantone "note[d] he [Claimant] is able to be accommodated with light duty occupation. He is unable to do his regular occupation but can be in a sedentary desk type position with no prolonged standing on hard surfaces." Dr. Mantone wrote "We will keep this in place until he sees my referral physician of Dr. Carlson. Ms. Gustafson has discussed with me independent medical evaluation and I think an excellent source would be Dr. Fithian as she has suggested." (CX 10-4, 10-5; EX 5-5(b)-(c)).

Dr. Mantone completed another "Return to Work or School" slip for Claimant on January 9, 2003, which noted that Claimant was unable to return to work that day "until see [illegible] Carlson." (CX 10-13; EX 5-6).

A prescription form from Tidewater Orthopedic is dated January 9, 2003. This form notes "Sedentary desk job No prolonged standing hard surfaces." The signature is illegible. (CX 10-17; EX 5-1(c)).[5]

Another prescription form from Tidewater Orthopedic is also dated January 9, 2003. This form notes "Dr. J. Carlson [illegible] R shldr hand numb MRI inject EMG pending." The signature is illegible. (CX 10-18).

A third prescription form from Tidewater Orthopedic is also dated January 9, 2003. This form notes "Dr. Ghabo—EMG/NCV R hand numb L small ring Cspine pathology R shldr head neck." The remainder of the form, as well as the signature, is illegible. (CX 10-18).

Claimant saw Dr. Robert J. Lanoue of Neurology Specialists, Ltd., on January 16, 2003. Dr. Lanoue noted numbness in the fingertips on both of Claimant's hands and also Claimant's

[5] CX 10-17 (which is also found at EX 5-1(c)) contains handwriting that does not appear to be that of Dr. Mantone which references the note indicated light duty work. A discussion on the record during the hearing confirmed that the handwriting that did not appear to be that of Dr. Mantone would be disregarded during the decision-making process. (TR. at 73-74).

statements that he felt weak in his arms and had a stiff neck in the morning. Dr. Lanoue found "Normal median and ulnar motor and sensory responses bilaterally. Normal palmar responses on the right hand. Normal needle exam of both arms." Dr. Lanoue's impression was that Claimant had a "normal study without electrical evidence of a peripheral neuropathy, plexopathy, or C5-t1 radiculopathy affecting either arm." Attached to Dr. Lanoue's comments are two charts; one is a series of line graphs, and the other is a series of two charts that are labeled "Nerve Conduction Report." One chart notes "Motor Nerves" and the other "Sensory Nerves." There is no additional explanation provided as to the findings that these charts represent. (EX 9-1).

Claimant saw Dr. Jeffrey R. Carlson of Orthopaedic Surgery and Sports Medicine Specialists of Hampton Roads on January 31, 2003, for his neck, left shoulder, and left arm pain. Claimant told Dr. Carlson that both of his forearms feel strange and that he has pain that goes into his feet, making his feet feel like they are going to lock up. Dr. Carlson noted that Claimant received an epidural steroid injection, which took away the burning sensation but did not take away all of the pain. Upon examination, Dr. Carlson found that Claimant was not tender in the trapezius, cervical spine, or shoulder areas. He exhibited normal shoulder strength and had no weakness in the fingers. He also had normal range of motion in his shoulder and had normal reflexes. Dr. Carlson reviewed an X-ray, which revealed normal cervical spine alignment and a mild disk protrusion at C5-6 without neurologic impingement. Dr. Carlson's impression was that Claimant's neck pain was "most likely related to musculotendinous strain." Dr. Carlson expressed a desire to involve Claimant with a physiatrist for long-term pain management. He did not see a need for operative intervention. Dr. Carlson recommended restricting Claimant to light duty work, with lifting no more than twenty pounds, and limited standing and sitting. (CX 11-1; EX 6-1).

Dr. Carlson completed a "Work Status" form for Claimant on January 31, 2003. Dr. Carlson noted that Claimant could return to light duty work on February 3, 2003, and lift no more than twenty pounds. The form also indicates no squatting, climbing, bending, or sitting. (CX 11-2; EX 6-2).

A prescription form from Orthopaedic Surgery & Sports Medicine Specialists of Hampton Roads is dated January 31, 2003. This form notes "Physical [illegible] strain Dr. Smith 2/6/03 2:00 p.m." The signature is illegible. (CX 11-3; EX 6-3).

On February 14, 2003, Dr. Carlson completed a "Medical Report for General Relief and Aid to Families with Dependent Children." This form notes Claimant's diagnosis as "cervicalagia" from his examination of Claimant on January 31, 2003, and the prognosis is noted as "improvement." Under the section "Employability Assessment," Dr. Carlson checked "no" in response to the question, "Does the diagnosis render the individual unable to work or severely limit the individual's capacity for self-support for 30 days (from onset) or more?" Dr. Carlson also wrote that Claimant's ability to care for a child was not hindered by the diagnosis. Under "Treatment," Dr. Carlson wrote that he referred Claimant to Dr. Smith. (CX 11-4; EX 6-4).

Claimant was seen on February 24, 2003, for an initial outpatient consultation by Dr. Gerry Smith at Riverside Rehabilitation Institute after being referred there by Dr. Carlson. Dr. Smith noted Claimant's chief complaint was neck pain. Dr. Smith's notes recount Claimant's

complaints of aching and burning pain in his neck and in the anterior and posterior regions of his right shoulder. Claimant also related a tingling and numbness sensation in his left forearm. Dr. Smith indicated that she reviewed a note that indicated a first degree AC separation. Claimant told Dr. Smith that his pain was constant and "10/10"; however, Dr. Smith noted "during today's physical examination, he did not appear to be having any pain at all, let alone pain at a level of 10/10." The bottom of the page ends mid-sentence, and is followed by "Page 1 of 3 **Original**." However, the following two pages do not appear to be a continuation of this document, as they are from Sentara Rehabilitative Services and indicate a date of March 20, 2003. (CX 13-1).

An initial evaluation form dated March 10, 2003, is signed by Richard D. Mocabee, MAPT, at Sentara Rehabilitation Services. Dr. Gerry Smith is noted as the physician. In the section labeled, "Data Base," Mr. Mocabee recounts Claimant's accident, that Claimant related he had a first-degree shoulder separation, and that he has trouble extending his neck. Claimant told Mr. Mocabee that he previously had an EMG but had had no physical therapy in the past. Claimant stated that he was beginning to have numbness in his upper extremities. Upon examination, Mr. Mocabee noted that Claimant had "multiple musculoskeletal dysfunctions including decreased mobility of his thoracic spine down to T5-T6 and decreased mobility of his neck at the C7-T1 level." (CX 13-2). Claimant told Mr. Mocabee that he wanted to be able to return to his normal activities and work without pain and also alleviate the numbness in his upper extremities. Mr. Mocabee noted that Claimant would be seen two to three times per week for the following three to four weeks for stretching, active and resisted exercise, and for instruction of home exercise. (CX 13-3).

Claimant was seen for an outpatient follow-up evaluation by Dr. Smith on March 17, 2003. Claimant indicated that he was experiencing pain in the AC joint region, and that his pain was "6-7/10." Claimant related to Dr. Smith that he was pleased with the physical therapy and believed that it was helping his neck and right shoulder pain. Claimant was performing exercises at home as directed and was taking Celebrex and Vicodin. Dr. Smith reviewed Claimant's EMG reading, which was normal. Claimant also indicated that "he considers himself to be under my [Dr. Smith's] care for his neck pain and his shoulder pain and would like me making all of the decisions at this point in time concerning treatment for these areas and concerning return-to-work issues. (CX 13-4; EX 7-1). Upon examination, Dr. Smith noted that Claimant had no indication of pain while sitting, standing, or walking. She diagnosed him with neck pain; status post cervical sprain/strain on October 25, 2002; and a history of right AC join first degree separation. Dr. Smith noted that Claimant would continue with physical therapy and the home exercise program. (CX 13-4; EX 7-1).

Claimant told Dr. Smith that his employer had no jobs available for him, although he was part of a union. Dr. Smith wrote that she filled out a form stating that Claimant could return to work the following day (March 18, 2003), with a restriction against lifting more than thirty pounds, and with limited lifting, stooping, bending, and twisting. Dr. Smith also wrote a note to Claimant's counsel, asking him to contact the case manager so that the case manager could attend future appointments Claimant had with Dr. Smith. Dr. Smith also wrote "Vicodin 5 milligrams, total number of #60 written for, one b.i.d. p.r.n. pain, Celebrex 200 milligrams b.i.d." Claimant was told to return to Dr. Smith's office in four weeks. (CX 13-5; EX 7-1(b)).

On March 24, 2003, Dr. Carlson completed a "Virginia Employment Commission Request for Physician's Certificate of Health." Dr. Carlson again diagnosis as "cervicalagia" from his examination of Claimant on January 31, 2003. Dr. Carlson checked "no" in response to the question "Did you advise the patient to quit last job or take a leave of absence because of health?" He also wrote that Claimant had not been incapacitated and totally unable to perform any work, and that Claimant was currently able to perform work. As to the limitations on Claimant's ability to work, Dr. Carlson wrote "See attached note," but it does not appear that the note is present in the evidence presented. (CX 11-5; EX 6-5).

Claimant was seen again at Dr. Smith's office on May 5, 2003, after not appearing for his appointment on May 1, 2003. Claimant said he was "'miserable'" and that he had neck pain and right AC joint region pain. Dr. Smith noted Claimant's statements that his neck pain was "8/10" and that the physical therapy had not helped much. Claimant described burning pain in the AC joint region. Claimant had run out of his prescriptions for Vicodin and Celebrex and instead had been taking Advil. Claimant also told Dr. Smith that Employer told him his position had been filled. Upon examination, Dr. Smith noted that Claimant sits, stands, and walks as if he is not in any pain; however, Dr. Smith did note that Claimant "does appear to be sad." Claimant was able to button and unbutton a shirt, and put on and take off a pullover shift over his head and shoulders without difficulty. Claimant had a functional active range of motion in his right shoulder and cervical spine. Claimant exhibited no tenderness in his lateral right shoulder, but did have mild tenderness in the right AC region and in the cervical paraspinal muscles. Dr. Smith maintained her diagnosis of neck pain; status post cervical sprain/strain on October 25, 2002; and a history of right AC join first degree separation. (CX 13-6; EX 7-2).

Claimant told Dr. Smith that he had two physical therapy sessions left and would discontinue physical therapy after that; he would continue his home exercise program. Dr. Smith wrote him another prescription for Celebrex, 200 milligrams, b.i.d., and "explained to [Claimant] I have nothing further to offer in terms of treatment." She wrote a consultation for an orthopedic evaluation of the right AC joint, which she understood had not been performed at that point. (CX 13-6; EX 7-2).

Claimant saw Dr. Carlson again on May 6, 2003, and reported that Dr. Smith had released him from her care after he completed fifteen physical therapy sessions. Claimant related that he had no relief of the pain in his cervical spine and that he wanted to return to full duty work after receiving an injection in his right shoulder. Upon examination, Dr. Carlson found no warmth, deformity, muscle atrophy, or instability in the shoulder. He did find tenderness in the subacromial space, and normal range of motion and strength in the shoulder. Claimant exhibited mild pain with resistance when externally rotating his shoulder. Dr. Carlson's impression was that Claimant's right shoulder pain and subacromial tenderness could be related to inflammation in his rotator cuff. Claimant was given a corticosteroid injection for the pain and was instructed to return in three weeks. (CX 11-6; EX 6-6).

A form from Sentara Therapy Center dated May 12, 2003, is signed by a physical therapist whose signature is illegible. The form notes that therapy was initiated on March 10, 2003, for nineteen visits. The therapist noted that Claimant continued to have "some stiffness

and [illegible] lateral hand [illegible]." The form notes a plan to continue therapy "1-2/wk X 3-4 wks." (CX 11-7).

Claimant was seen again by Dr. Carlson on May 28, 2003. He reported to Dr. Carlson that the injection improved his right shoulder for approximately one week, but while cleaning his house, "he heard a loud pop around his right shoulder and had significant pain around his right upper extremity." Upon examination, Dr. Carlson found no warmth, deformity, muscle atrophy, or instability in the shoulder. Range of motion and shoulder strength was normal. Dr. Carlson found no tenderness of the subacromial bursa, glenohumeral joint region, or the bicipital groove. Upon reviewing Claimant's X-ray, Dr. Carlson noted normal alignment in Claimant's shoulder. Dr. Carlson sent Claimant for an MRI of the right shoulder to rule out a rotator cuff tear, and he was instructed to return to the office three days after the MRI. (CX 11-8; EX 6-7).

An MRI of Claimant's right shoulder was performed on June 4, 2003, by Dr. John D. O'Neil of Hampton Roads Radiology Associates. Dr. O'Neil found "some mildly increased signal present in the posterior supraspinatus tendon suggesting mild tendinopathy" but noted that finding might represent "magic angle phenomenon." Dr. O'Neil found no partial or full-thickness tear, and noted that the muscles of the rotator cuff were unremarkable. Dr. O'Neil also noted that a "type 2 acromion" was present, as was "some mild degenerative arthropathy" at the acromioclavicular joint. There was also "marrow edema present on both sides of the joint, suggesting that this process is active and may certainly be painful." (CX 11-9; EX 13-1). Dr. O'Neil's impression was "Questionable mild posterior supraspinatus tendinopathy close to the point of insertion. No partial or full-thickness tear. Normal variant diminutive posterior labrum. No evidence of any labral tear. Active degenerative joint disease at the acromioclavicular joint, with mild to moderate marrow edema seen on both sides." (CX 11-9, 11-10; EX 13-1, 13-2).

Claimant returned to see Dr. Carlson on June 10, 2003, and told Dr. Carlson that his right shoulder seemed to be doing slightly better and was not as painful as at his last visit. Dr. Carlson again found no warmth, deformity, muscle atrophy, or instability in the shoulder. Range of motion and shoulder strength was normal. Claimant had no tenderness of the subacromial bursa, glenohumeral joint region, or the bicipital groove. Dr. Carlson reviewed the MRI results and found that it revealed "mild arthritic changes to the AC joint of the right shoulder." Dr. Carlson opined that Claimant could be "as active as he would like" at that point and that he "can be back to full duty at work." Claimant was told to return to his office as needed. (CX 11-11; EX 6-8).

On June 10, 2003, Dr. Carlson completed a Work Status form for Claimant, in which Dr. Carlson wrote that Claimant could return to regular duty on June 11, 2003. There are no restrictions noted on the form. (CX 11-12; EX 6-9).

Claimant returned to Dr. Carlson's office on June 20, 2003, "saying he need[ed] to apply for a permanent partial disability. He does have some problems around his shoulder with pain in the shoulder and neck." Dr. Carlson examined Claimant, and his findings as to lack of tenderness, and normal range of motion and strength in Claimant's shoulder remained the same as in the in previous visit. Dr. Carlson found that Claimant continued to have shoulder and neck problems, and he suggested that Claimant undergo a functional capacity evaluation for a permanent disability rating. (CX 11-13; EX 6-10).

A functional capacity evaluation was performed on Claimant on July 1, 2003, by Gwen Garrett, MAOTR/L, at Aquatic Therapy of Virginia, PLC. Ms. Garrett opined that Claimant gave a "reliable effort," and was motivated during testing. She found no evidence of symptom magnification or self-limiting behavior. Ms. Garrett found that Claimant exhibited the following functional abilities:

> "Lifting activities at the Light level: Mid Lift, Low Lift; at the Sedentary level: High Lift, Full Lift. Patient is able to perform the following activities on a Frequent basis: Walk, Carry---10 lbs Kneel, Reach Immediate (L), Handling (R), Fingering (R); on an Occasional basis: Push Cart—40 lb, Pull Cart—40 lb, Stoop, Crouch, Reach Immediate (R), Climb Stairs. His cardiovascular endurance is average."

Ms. Garrett also found that, because Claimant is a right-handed carpenter, he is limited in his right upper extremity range of motion, strength, and functional abilities. These abilities include: "activities performed above shoulder level, overhead reaching, bilateral carrying and sustained right upper extremity tool use." Based on these findings, Ms. Garrett concluded that Claimant was capable of light work "in the floor to waist plane of motion," but because of his right shoulder problems, his lifting tolerance between the waist and shoulder must be at the sedentary level. Ms. Garrett provided the following impairment ratings: "Right Arm 24%, Cervical Spine 5% which equals a 18% Whole Body Impairment Rating." (CX 16-1).

Claimant returned to Dr. Carlson's office on July 21, 2003. Dr. Carlson found that Claimant's cervical spine had a normal appearance, was not tender, and there was no spasm of the paracervical muscle. Claimant exhibited no tenderness on the trapezius muscle, the subacromial bursa, the glenohumeral joint, or the bicipital groove. Claimant had normal rotation of the spine and normal range of motion and strength in his shoulder. Claimant exhibited no warmth, deformity, or muscle atrophy in his shoulder, and had normal reflexes and normal motor strengths in his upper extremities. He had no weakness in his fingers. Dr. Carlson reviewed the functional capacity evaluation, and his impression was that Claimant's difficulties would make a light-duty position appropriate for him, and that he should continue this as a permanent restriction. (CX 11-14).

By letter dated July 25, 2003, Dr. Carlson informed Claimant's counsel that he had reviewed the functional capacity evaluation, and that he agreed with the 24% rating of his arm, the 5% rating of the cervical spine, and the overall 18% rating for Claimant's body. He also stated his agreement that Claimant could perform a light-duty position. (CX 11-15).

Claimant returned to Dr. Carlson's office on September 2, 2003, complaining of continued neck and shoulder pain. Dr. Carlson examined Claimant and again found no warmth, deformity, muscle atrophy, or instability in his shoulder; and no tenderness of the glenohumeral joint region or the bicipital groove. Claimant did have tenderness in the subacromial space and on the posterior aspect of the shoulder. Claimant had normal range of motion and strength in his shoulder. Dr. Carlson gave him a corticosteroid injection in the right shoulder, and sent him to a physiatrist for long-term pain management. (CX 11-16; EX 6-11).

A prescription form from Orthopaedic Surgery & Sports Medicine Specialists of Hampton Roads is dated September 2, 2003. This form is largely illegible with the exception of "[illegible] pain Dr. Ross." The signature is illegible. (EX 6-12).

Claimant was seen at Riverside Regional Medical Center on September 21, 2003. Employer offers that the consulting physician was Dr. Anthony Carter; however, the signature is illegible. The report notes that Claimant sustained an injury to his left forearm while cutting down trees. Claimant reported that a piece of wood struck his forearm, which caused pain and swelling. The remainder of the form is illegible except for the following: "smokes 2 ppd X 28 yrs . . . LT . . . radius . . . skin intact . . .Rec. [illegible] splint." (EX 17-1).

Dr. Felix Kirven of Orthopaedic Associates of Virginia evaluated Claimant's neck and right shoulder on October 6, 2003. At that time, Claimant complained of aching, numbness, and burning in his neck and right shoulder. Claimant had no numbness in his hands. On a scale of one to ten, Claimant stated that his pain was a six on that day, and that his pain is constant. Claimant related that his pain lessened when he lay down, engaged in his home exercise or physical therapy, and when he took pain medication. His pain worsened when he sat, drove, stood, bent forward and backwards, and during and after exercise. Dr. Kirven reviewed details of Claimant's accident as well as a portion of Claimant's medical treatment since the accident. Dr. Kirven also reviewed Claimant's medical records. Claimant told Dr. Kirven that his recreational activities include golfing and cutting trees.[6] He also told the doctor that he was not currently working, but had helped a neighbor cut a tree recently, which resulted in a broken left wrist for which he had surgery. Claimant complained of stiffness, swelling, and pain in his shoulder and left arm. Claimant also indicated that he was depressed and had trouble sleeping. Upon examination, Dr. Kirven noted that Claimant had "active range of motion of the cervical spine" and a "lordotic cervical curve." Claimant had no spasms and a negative Spurling's maneuver. Dr. Kirven found that Claimant had full motion with no tenderness. (EX 14-1).

Upon examining Claimant's previous X-rays, Dr. Kirven found those taken of the right shoulder on January 31, 2003, were negative. The cervical spine radiographs dated January 31, 2003, showed "mild spondylitic changes." An MRI of the cervical spine dated November 13, 2002, showed "mild degenerative changes at C5-6 and C6-7. No foraminal compression." Another MRI dated June 4, 2003, of Claimant's shoulder showed "some AC joint degenerative changes. An EMG and nerve conduction study dated January 16, 2003, contained no evidence of neuropathy or plexopathy. Dr. Kirven's impression was that Claimant sustained a "cervical strain and a shoulder contusion on the right" as a result of his accident. Dr. Kirven opined that Claimant "has no permanent nor partial impairment of his right shoulder or neck" and that he "can work full duty given that he was out cutting a tree on September 25, 2003." Dr. Kirven did not believe that Claimant required further medical treatment on his neck or shoulder and that he could return to full active duty work with no restrictions. (EX 14-1).

[6] Claimant testified at the hearing that he told Dr. Kirven that he used to play golf, but had not played golf in 1 1/2 to 2 years. (TR. at 93-94).

On October 28, 2003, Dr. Mark A. Ross of Riverside Rehabilitation Institute completed a prescription form that contains Claimant's name and the following: "R A-C joint injection by Dr. Carlson." (CX 17-1).

Claimant was seen by Dr. Ross on November 21, 2003, for an outpatient follow-up evaluation. Dr. Ross diagnosed right neck and shoulder pain after Claimant's fall on October 25, 2002, and a left forearm fracture. Claimant brought with him to this visit the results of his functional capacity evaluation. Claimant told Dr. Ross that he had received an injection in the right AC joint since his last visit but that the injection did not help much; Claimant rated his pain at "5/10." (EX 18-1). Dr. Ross noted that Claimant was nontender in the AC joint and his entire upper extremity except for an area in the posterior aspect of his shoulder. Dr. Ross found Claimant had good strength in the muscle groups in both upper extremities, and he did not provoke much discomfort during the muscle testing. Dr. Ross opined that it had been over a year since Claimant's accident and that he had reached maximum medical improvement. Dr. Ross stated, "I do not feel any further medical intervention will provide any benefit." As to the rating percentages provided in the functional capacity evaluation, Dr. Ross wrote "I am no [*sic*] certain that I agree with the percentage. At this time, I feel he is at maximum medical improvement but able to continue to work full time in a limited capacity. I feel the functional capacity evaluation represents a minimum of his functional capabilities." (EX 18-1).

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614-15 (1982); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the elements of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Indus.*, 455 U.S. at 615. Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

Claimant testified that on October 25, 2002, he was building scaffolding when an explosion occurred nearby. This explosion caused him to jump up to try to leave the area. He testified that he grabbed a pipe to pull himself up, and when he did so, the pipe came down onto his right arm. (TR. at 66-67). Claimant further testified that he was treated by Dr. Mantone and released to light-duty work the day after the accident. (TR. at 67-68). Claimant's medical records show that he was treated by Dr. Mantone following the accident. Claimant told Dr. Mantone on November 4, 2002, that he was experiencing numbness in his hands, difficulty turning his head. (CX 10-2).

To invoke the presumption, all that Claimant must show is that he suffered a harm and that employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated the condition. As stated above, Claimant's employment is subject to coverage under the Longshore & Harbor Workers' Compensation Act. That Claimant sustained an injury is undisputed. That Claimant suffered an initial harm is also undisputed. Claimant testified credibly that he experienced pain following the accident and had pain even after he was initially released by Dr. Mantone to return to work in a light-duty position. He also testified that he continues to experience pain. His medical records also confirm that he has continued to be treated for pain in his neck and right shoulder.

Upon consideration of the evidence as well as the stipulations entered by the parties, I find that Claimant has established a prima facie case for compensation and is entitled to the presumption of Section 20(a) that his condition is casually related to the injury he sustained on October 25, 2002. The burden of proof then shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence that establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976); *Peterson v. General Dynamics Corp*., 25 BRBS 71, 78 (1991); *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Substantial evidence is relevant evidence such that a reasonable mind might accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Dearing v. Director, OWCP*, 998 F.2d 1008, at *2, 27 BRBS 72, 75 (CRT (4th Cir. 1993) (unpublished) (per curiam); *Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967); *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and the employment. *See Am. Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817-19 (7th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

The employer may also rebut the presumption with negative evidence, but again, negative evidence must be "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton*, 554 F.2d at 1083. An employer cannot rebut the presumption on the basis of suppositions or equivocal testimony. *Dewberry v. S. Stevedoring Corp.*, 7 BRBS 322, 325 (1977), *aff'd mem.*, 590 F.2d 331 (4th Cir. 1978). Rather, an employer must show either facts or negative evidence that is both specific and comprehensive to overcome the presumption. If the employer presents specific and comprehensive evidence

sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must resolved on the whole body of proof. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Volpe v. Northeast Marine Terminals, Inc.*, 671 F.2d 697, 700 (2d Cir. 1981); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986).

There was no testimonial evidence elicited by Employer that would contribute toward it meeting its burden of rebutting the Section 20(a) presumption. In its post-hearing brief, Employer fails to argue that Claimant's condition was not caused by his accident at work; instead, Employer's argument focuses primarily on the extent of Claimant's injury, particularly, that after being released to light duty work by Dr. Mantone, Claimant left the job because he was bored, and that he was always capable of performing the light duty work. (Employer's Brief, at 16).

To sustain its burden of rebutting the Section 20(a) presumption, Employer has submitted, among other things, medical records into evidence. (EX 3 through EX 14, EX 17, EX 18). Dr. Mantone noted, after examining Claimant on November 4, 2002, that he believed Claimant's injury was "just a contusion/direct blow." (EX 5-2(b)). Dr. Smith opined when she examined Claimant during an initial outpatient evaluation on February 24, 2003, that Claimant "did not appear to be having any pain at all, let alone pain at a level of 10/10." (EX 13-1). Dr. Kirven, who examined Claimant only once, opined that Claimant sustained a cervical strain and right shoulder contusion as a result of his work accident. (EX 14-1).

However, at no time did any of the medical professionals who examined Claimant state that Claimant's injury was not caused by his work accident such that the connection between Claimant's harm and employment would be severed. The statements made by Dr. Mantone and Dr. Smith certainly do not rise to the level of specific and comprehensive evidence, but rather, fall into the category of speculation. To be sure, Employer does submit evidence that Claimant broke his left arm while helping a neighbor move or cut a tree following the hurricane in September, 2003, and Claimant did testify that he now had a steel plate in his left arm. However, at no point does Employer offer any evidence that Claimant's current condition and problems with his right shoulder and neck were not caused by his employment.

Upon consideration, I find that the evidence highlighted by Employer does not establish that Claimant's accident at work on October 25, 2002, did not cause his neck and right shoulder problems. The medical evidence submitted by Employer is insufficient to rebut the presumption, as explained above. Because Employer has not met its burden of proof in rebutting the Section 20(a) presumption, I find that Claimant's injury is compensable under the Act.

Nature and Extent of Disability

Claimant in this case seeks awards for both temporary total and temporary partial disability benefits. Claimant seeks temporary total disability benefits commencing December 24, 2002, through May 11, 2003, inclusive, and from June 11, 2003, through October 26, 2003, inclusive. Claimant seeks temporary partial disability benefits from May 12, 2003, through June

10, 2003, inclusive, and from October 27, 2003, through the present and continuing. (Claimant's Brief, at 28). Claimant does not contend that he has reached maximum medical improvement; therefore, he is entitled only to temporary compensation.[7] *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984).

Temporary Total Disability

To establish a prima facie case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of a disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978). In addition, a claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that the claimant can perform certain types of work activities. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991).

The initial issue to be addressed in determining whether Claimant is entitled to temporary total disability is whether Claimant quit his job with Employer on December 23, 2002. Employer argues that Claimant was released to and provided a light-duty position, but that he abandoned that position on December 23, 2003, because he was "bored." (Employer's Brief, at 16). As a result, Employer argues, Claimant is not entitled to benefits because he left work and intentionally reduced his income. (Employer's Brief, at 17-18). Claimant argues that he did not quit his employment with Employer, but instead, that he left work on December 23, 2002, because of pain. In speaking with Dr. Mantone's nurse, Claimant argues that she told him to stay out of work until January 9, 2003, the date on which he made an appointment to see Dr. Mantone. Claimant asserts that he relayed this information to his supervisor. (Claimant's Brief, at 22). Claimant maintains that Employer, and in particular Mr. Davis, admitted that Claimant never voluntarily quit, but that that was only how Mr. Davis was interpreting what Claimant stated. (Claimant's Brief, at 22).

Claimant testified, and the medical records confirm that on December 20, 2002, he received an epidural steroid injection administered by Dr. Dominguez, which caused pain and swelling in his back. (TR. at 69; CX 10-11, 14-2). Following the epidural injection, Dr. Dominguez recommended two to three days of rest at home, and stating that Claimant could

[7] It is true that the medical evidence submitted by both parties contains evidence that Claimant may have reached maximum medical improvement. Counsel for the Claimant indicated that at the time the case was filed, no doctor had indicated Claimant had reached maximum medical improvement. A discussion during the hearing yielded that the parties were not prepared to stipulate as to a date that maximum medical improvement was reached. (TR. at 12-13). On March 29, 2004, Counsel for Claimant submitted an amended Form LS-18 that contained the new issue of permanency and requested a supplemental hearing on that matter. However, by letter dated April 14, 2004, Claimant's counsel withdrew the amended LS-18, stating that Claimant had been referred to a new physician for additional medical treatment. Therefore, the issue of permanency will not be addressed herein.

return to work on December 23, 2002. (CX 14-4; EX 10-1). On December 23, 2002, Claimant was at work when he telephoned Dr. Mantone's office; he spoke with the nurse and made an appointment to see Dr. Mantone on January 9, 2003. (TR. at 69-70). Claimant testified that he then told Mr. Davis that he was leaving the job site because of pain from the cortisone injection. He also told Mr. Davis that Dr. Mantone's nurse would be sending an out-of-work form via facsimile. (TR. at 71, 95). Mr. Davis testified that he could not say for certain whether he received the form or not. (TR. at 114, 119). Mr. Davis also testified as to his conversation with Claimant on December 23, 2002, and that Claimant told him that he was in a great deal of pain. However, he also stated that Claimant told him he was bored with his light-duty position of cleaning up the carpentry shop. (TR. at 111-12). Mr. Davis interpreted Claimant's statements that day to mean that he was quitting his job. (TR. at 114).

Based upon the evidence, I find that Claimant did not voluntarily quit his job on December 23, 2002. The events leading up to and including December 23, 2002, indicate to me that Claimant was in pain as a result of the steroid injection on December 20, 2002. Claimant's actions following December 23, 2002, also indicate to me that Claimant did not voluntarily quit work. Claimant kept his appointment with Dr. Mantone on January 9, 2003, and Dr. Mantone's notes on that date indicate that Claimant continued to complain that the steroid injection had worsened his symptoms and pain over the two preceding weeks. Based on the results from the steroid injection, Dr. Mantone recommended discontinuing the cervical epidural. (CX 10-3; EX 5-5(a)). Further, after Claimant was released by Dr. Carlson on February 3, 2003, Claimant returned to his job site. (TR. at 75; CX 11-2; EX 6-2). However, when he arrived at work, he was told that he could not be rehired at that time because his position had been filled. (TR. at 75-76). Claimant was never specifically told by Mr. Davis that he [Mr. Davis] thought that Claimant had quit on December 23, 2002. Therefore, as the dispute as to whether Claimant quit his job on December 23, 2002, is resolved, I will now determine whether Claimant is entitled to temporary total disability.

Both parties submitted identical lists of carpenter's tasks. (CX 8; EX 1). As a carpenter, Claimant was required to engage in various tasks. While a majority of the tasks do not involve the exertion of physical strength (i.e., demonstrating the ability to abide by safety regulations, identify specific hand tools, and perform basic math), other tasks would necessitate Claimant use upper body strength. These include constructing wall and footing forms and constructing scaffolding. (CX 8; EX 1). Claimant testified that under his restrictions, he would not be able to return to his previous position as a carpenter. He testified that building scaffolding would require him to lift as much as one hundred pounds and to hold on to scaffolding (supporting his own body weight) while climbing and passing materials to other workers on the scaffold. (TR. at 78-79).

Claimant argues in his post-hearing brief that he is entitled to temporary total disability for the periods of December 24, 2002, through May 11, 2003, and from June 11, 2003, through October 26, 2003. Claimant asserts that he left work on December 23, 2002, because of pain, and was told to stay of work by Dr. Mantone's nurse. (Claimant's Brief, at 22). Claimant then cites to the medical disability slip covering the dates December 23, 2002, through January 9, 2003, as support for the fact that Claimant left work on December 23 under Dr. Mantone's care. Claimant maintains that he continued to be totally disabled from January 9, 2003, until he saw

Dr. Carlson, per Dr. Mantone's instructions. (Claimant's Brief, at 23). Claimant argues that Dr. Carlson also kept Claimant on light duty because of his inability to lift and his difficulty in sitting. (Claimant's Brief, at 26). Claimant additionally argues that the addendum to Dr. Mantone's January 9, 2003, notes was never communicated to him and was an "obvious attempt by the Employer's agent [Ms. Gustafan] to manipulate the claimant's physician into a light duty release that was never communicated to the claimant." (Claimant's Brief, at 23-24). Claimant also asserts that Dr. Kirven's conclusions should be accorded less weight in the analysis because Dr. Kirven examined Claimant only once and performed the examination on behalf of Employer. Further, Claimant argues that Dr. Kirven's one-time examination did not occur until one year after Claimant's injury, and that Dr. Kirven's recommendations are in direct conflict with all of the other medical examiners in the file." (Claimant's Brief, at 25-26).

To this extent, Employer argues that the medical disability slip covering December 23, 2002, through January 9, 2003, "is not a valid medical record" because the slip "was signed by a nurse, who had not seen or examined the Claimant contemporaneously with the issuance of the disability slip, and only had heard his subjective complaints over the telephone." (Employer's Brief, at 16-17). Employer argues that on January 9, 2003, Dr. Mantone reiterated the previously imposed light duty restrictions. (Claimant's Brief, at 17).

Based upon the testimony and evidence presented, I make the following findings. I find that Claimant was totally disabled and unable to perform his regular and usual employment due to his work-related injury from December 24, 2002, through May 11, 2003, inclusive, and from June 11, 2003, through October 26, 2003, inclusive. Claimant credibly testified that he was experiencing pain from an epidural injection administered on December 20, 2002, when he left work on December 23, 2002. The evidence is clear that Claimant was told to remain out of work until he saw Dr. Mantone on January 9, and then again from January 9, until he saw Dr. Carlson. The fact that a nurse signed Dr. Mantone's name on the disability slip covering December 23, 2002, through January 9, 2003, without more, does not invalidate the slip; Employer fails to provide other evidence to establish that the nurse who signed Dr. Mantone's name did not have authority from Dr. Mantone to do so. At no point in Dr. Mantone's notes in Claimant's file did he allude to the fact the nurse should not have signed the disability slip. In fact, Dr. Mantone's statements to Claimant that he remain out of work until he [Claimant] was able to see Dr. Carlson substantiate the validity of the disability slip.

Dr. Mantone next examined Claimant on January 9, 2003, at which time Dr. Mantone completed an out-of-work form for Claimant, which stated Claimant should stay out of work until he saw Dr. Carlson. (CX 10-4, 10-13; EX 5-5(b)), 5-6). Further, Claimant credibly testified that he did not receive communication from Dr. Mantone as to the addendum stating that Claimant could return to light duty work. Claimant was never told by the case manager, Ms. Gustafan, nor by Employer (either by Mr. Davis or Mr. Rosier), that Dr. Mantone had changed his mind after he left his office that he should be able to work a light duty position. Claimant cannot be held accountable for information that he did not know, did not receive, and had no way of knowing existed so as to place a burden upon him to seek it out. The burden was on Dr. Mantone or his staff or the Employer to inform Claimant that Dr. Mantone's assessment of his situation had changed, and that burden was not met. Therefore, Claimant will not be held accountable for knowing information that he could not have known even existed.

The restrictions placed upon Claimant by Dr. Carlson on January 31, 2003, would preclude Claimant from engaging in his regular and usual employment, as Claimant would be unable to lift the weight necessary to perform his tasks since he was told to lift no more than twenty pounds. He would not be able to lift the scaffolding materials nor climb the scaffolding while supporting his own body weight. He was also restricted to limited standing, which would further hinder his ability to engage in carpentry tasks. The restrictions placed upon Claimant by Dr. Smith were similar to those placed upon him by Dr. Carlson, except that Dr. Smith felt that Claimant could lift up to thirty pounds; this difference, however, still would not allow Claimant to perform his duties as a carpenter.

While Dr. Carlson did release Claimant to full duty on June 11, 2003, following the results of the functional capacity evaluation on July 1, 2003, Dr. Carlson then agreed that a light duty position was appropriate for Claimant; he also agreed with the assigned impairment ratings. I find that the period between which Dr. Carlson stated Claimant could return to full duty and when he opined that a light duty position was appropriate for Claimant (which was on July 21, 2003), Claimant was totally disabled and unable to return to his regular and usual employment. Based upon the evidence, Claimant's condition did not improve to the point that Claimant was able to perform his tasks as a carpenter during that approximate five-week period.

Finally, I find that Dr. Kirven's medical examination should be accorded less weight than that of Dr. Carlson. Dr. Kirven only examined Claimant on one occasion, one year after his work-related accident. Dr. Kirven seemingly disregarded Claimant's statements that his pain worsened when he sat or drove for long periods of time. According to Claimant's testimony, which I find credible, Dr. Kirven misrepresented Claimant's statements to him regarding his engaging in recreational activities such as golf. Dr. Kirven's finding on the MRI dated November 13, 2002, fails to mention any problems with Claimant's vertebra at the C5-6 level or any disc bulging, as mentioned by other interpretations by Dr. Snyder and Dr. Mantone. Further, Dr. Carlson treated Claimant beginning in January, 2003, three months after the accident, and reviewed multiple X-rays. He had the opportunity to observe Claimant both before and after Claimant's physical therapy sessions. While Dr. Kirven did examine Claimant's medical records, I find that he at the least gave them less credence without having a basis to do so. As a result, I find that Dr. Kirven's examination findings should be accorded less weight.

Therefore, based upon these findings, I find that Claimant was totally disabled from December 24, 2002, to and including May 11, 2003, and from June 11, 2003, through and including October 26, 2003.

Suitable Alternate Employment

As Claimant has made a prima facie showing that he was totally disabled during the aforementioned time periods, the burden now shifts to Employer to show that suitable alternate employment existed during that time period. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984); *Rinaldi v. General Dynamics Corp*., 25 BRBS 128, 131 (1991) (per

curiam). If Employer fails to rebut the prima facie case of total disability, Claimant will be considered totally disabled and entitled to temporary total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989); *Blake v. Bethlehem Steel Corp*., 21 BRBS 49, 54 (1988).

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). The job opportunities must be located in the relevant labor market. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380-81 (4th Cir. 1994) (holding that the employer must show availability of employment in the community in which the claimant presently lives). Further, the employer must show the availability of actual, not theoretical, employment opportunities as well as the nature, terms, and pay scales for the alternate jobs. *Manigault*, 22 BRBS at 334 (citing *Thompson v. Lockheed Shipbuilding Constr. Co.*, 21 BRBS 94, 97 (1988)); *Royce v. Erich Constr. Co.*, 17 BRBS 157, 159 (1985); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978).

The employer also carries the burden of showing the reasonable availability of specific jobs within the job market at critical times. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Turner*, 661 F.2d at 1043. The Fourth Circuit has interpreted "critical time" to mean the time "during which the claimant was able to seek work." *Tann*, 841 F.2d at 543. The date on which suitable alternate employment became available is that date upon which Claimant could have realistically secured employment had he made a diligent effort. *Id*. at 542; *Trans-State Dredging*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43). The earliest date on which suitable alternate employment becomes available determines the date on which the extent of a claimant's disability changes, economically and medically speaking, from total to partial disability. *Rinaldi*, 25 BRBS at 103-31 (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)).

When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exist." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). The employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id*. The purpose of the labor market survey is not to find the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. The courts have consistently held that the employer is not required to become an employment agent for the claimant. *Tann*, 841 F.2d at 543; *see Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employer may meet this burden of showing suitable alternate employment by "presenting evidence of jobs which, although no longer open when located, were available during the time claimant was able to work." *Tann*, 841 F.2d at 543.

Alternatively, an employer can establish suitable alternate employment by offering an injured employee a light duty job that is tailored to the employee's physical limitations, so long

as the job is necessary to the employer's business and the injured employee is capable of performing such work. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). However, if that job becomes unavailable, then the employer's burden is no longer satisfied. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999).

Labor Market Survey

A labor market survey was completed by Ms. Theresa Swartzbaugh on November 11, 2003, after Claimant's case was referred to her by Employer's counsel on October 28, 2003.[8] (EX 15-1, at 3). Ms. Swartzbaugh testified that she completed the labor market survey without meeting with Claimant, and wrote in the labor market survey that she did not meet with Claimant because of "time constraints." (TR. at 132; EX 15-1, at 3). Ms. Swartzbaugh found eight positions that she believed were compatible with Claimant's transferable skills and functional capacity. (EX 15-1). However, Ms. Swartzbaugh never provided the job analyses to any of the physicians who examined or treated Claimant for their approval. (TR. at 132). Based on the eight positions identified, Ms. Swartzbaugh asserts that Claimant has a potential wage earning capacity of $6.00 to $9.00 per hour, or $240.00 to $360.00 per week. (EX 15-1, at 2).

According to the labor market survey, Ms. Swartzbaugh took into consideration Claimant's work history; Claimant's medical treatment records with Drs. Carlson, Mantone, Smith, Dominguez, and Kirven;[9] his functional capacity evaluation; Claimant's job search records; and Claimant's deposition. (EX 15-1, at 3-4). To determine potential suitable alternate employment, Ms. Swartzbaugh also utilized the OASYS Virginia Occupational Employment Statistics; the Department of Labor *Dictionary of Occupational Titles* (revised 4th Edition); the 1992 Revised *Classification of Jobs*; the Virginia Employment Commission's Electronic Labor Market Access; and the Virginia Employment Commission's Automated Labor Exchange. (EX 15-1, at 4).

Despite the fact that Ms. Swartzbaugh did not perform a vocational assessment of Claimant because of the aforementioned "time constraints," Ms. Swartzbaugh still assigned levels to Claimant's reasoning, mathematical, and language development skills, "based on [Claimant's] work experience as a carpenter." She assigned skill level 4 to Claimant's reasoning and mathematical abilities, and skill level 2 to Claimant's language abilities. (EX 15-1, at 5-6). Ms. Swartzbaugh wrote in the report that she took into account Claimant's deposition statements that he finished high school and completed a couple of years of college at a community college in Illinois. (EX 15-1, at 6).

[8] Ms. Swartzbaugh testified during the hearing that the referral date of November 3, 2003, listed on page one of the labor market survey, was a typographical error, and that the case was actually referred to her on October 28, 2003, as stated on page three of the report. (TR. at 132).

[9] Ms. Swartzbaugh did note that, for the purposes of the labor market survey, the positions were screened based upon the functional capacity evaluation, which was approved by Dr. Carlson, instead of on Dr. Kirven's independent medical examination, which found that Claimant was capable of full duty work. (EX 15-1, at 5).

Ms. Swartzbaugh took the following capabilities into account as per the functional capacity evaluation: frequent walking; frequent kneeling; occasional climbing stairs; occasional stooping and crouching; occasional pushing and pulling of carts; occasional low and mid lights to twenty pounds; frequent low and mid lifts to ten pounds; occasional high lifts (shoulder and above) to ten pounds; occasional carrying to fifty pounds; frequent carrying to twenty-five pounds; constant carrying to ten pounds; occasional pushing and pulling to twenty pounds. (EX 15-1, at 5). Based on Claimant's work experiences, Ms. Swartzbaugh determined that Claimant had a number of transferable skills, including "experience in examining specifications to determine dimensions of structures," "ability, knowledge and experience to examine and inspect parts and equipment for cleanliness, damage, and compliance with standards or regulations," "ability to analyze blueprints, proposal and other documents to prepare time, cost and labor estimates," and "ability to learn new skills." (EX 15-1, at 7-8).

Ms. Swartzbaugh identified four areas of career alternatives for Claimant: (1) sales clerk/counter clerk; (2) parking lot attendant; (3) front desk clerk; and (4) security guard, armed.

1. P.C. Contracting, Gloucester, Virginia, *Estimator*

Ms. Swartzbaugh examined this position because Claimant is currently working in this position and secured this position on his own. According to Ms. Swartzbaugh, this position demonstrates Claimant's ability to "deal with the public, provide customer service, and to learn a new career field." (EX 15-1, at 8-9). She also wrote that in 1998, this position was listed in the Virginia Employment Commission's Electronic Labor Market Access as having an average entry wage of $12.90 per hour, and therefore, the $6.00 per hour Claimant was earning was below average but that usually formal training and work experience in this area was required, which Claimant did not have. (EX 15-1, at 9). Ms. Swartzbaugh found no other jobs similar to this one available when she performed her labor market survey. (EX 15-1, at 8).

2. Williamsburg Pottery Outlets, Williamsburg, Virginia, *Sales Person*

This position requires selling merchandise to the public. The *Dictionary of Occupational Titles* ("DOT") number identified for this position was 290.477-014. Within one week of the labor market survey, this employer had hired for this position. The hourly wage is listed as $7.00, and this is a 40-hour per week position. (EX 15-1, at 9-10).

3. [No Specific Employer Listed], Williamsburg, Virginia, *Counter Clerk*

No employer was listed for the third position listed, which was counter clerk. The DOT number identified for this position was also 290.477-014. The labor market survey states that, according to Virginia Employment Commission's Automated Labor Exchange, the counter clerk position was currently available. The salary is listed as $6.50 per hour for a 40-hour work week. (EX 15-1, at 10).

4. [No Specific Employer Listed], Norfolk, Virginia, *Parking Lot Attendant*

No employer was listed for the fourth position, which was parking lot attendant. The DOT number identified for this position was 915.583.010. The labor market survey states that, according to Virginia Employment Commission's Automated Labor Exchange, the parking lot attendant position was currently available. The salary listed is $6.50 per hour for a 40-hour work week. (EX 15-1, at 10).

5. Edison Parking Management, Norfolk, Virginia, *Parking Lot Cashier*

There is no specific information listed for the duties of the parking lot cashier. Under the general heading of the "Parking Lot Attendant" job category, the survey states "Parking lot attendants park autos or issue tickets for customers in a parking lot or garage." The DOT number identified for this position is 211.462.010. The employer had openings for this position within the week the survey was completed. The hourly wage is $6.25 per hour, and this is a 40-hour per week position. (EX 15-1, at 10).

6. West Gate Resort, Williamsburg, Virginia, *Tour Desk Clerk*

There is no specific information listed for the duties of tour desk clerk. Under the general heading of the "Hotel Desk Clerk" job category, the survey states "Hotel desk clerks register and assign rooms to guests, issue room keys, transmit and receive messages, keep records of occupied rooms and guests' accounts, make and confirm reservations, and present statements to and collect payments from departing guests." The DOT number identified for this position is 238.367-038. This employer hired within two weeks of the survey for this position, which has a salary of $7.00 per hour, for a 40-hour work week. (EX 15-1, at 10-11).

7. Hawk Security, Hampton, Virginia, *Unarmed Security Guard*

Under the general heading of "Security Guard," the survey states that no previous experience is required for employment as a security guard, but employment is conditioned upon successful passage of a training and testing program through the Virginia Department of Criminal Justice Services. According to Ms. Swartzbaugh, individuals in these positions would not be required to physically intervene in the event of a problem. (EX 15-1, at11). Also, the survey states that a security guard would be required to, among other things, "stand guard at an entrance gate"; "guard property against fire, theft, or vandalism"; and "control traffic." (EX 15-1, at 11). This particular employer currently had openings. The DOT number identified for this position is 372.667-034. The job site listed is "Peninsula." The listed salary is $6.00 per hour for a 40-hour work week. (EX 15-1, at 12).

8. Security Services of America, Newport News, Virginia, *Unarmed Security Guard*

This particular employer also had openings available at the time the survey was conducted. The job site location was listed is "Peninsula." The DOT number listed for this position was 372.667-034. The listed salary is $6.00 per hour. The survey notes that this position "start[s] part-time and increase[s] to full-time, 40 [hours]." (EX 15-1, at 12).

9. Securitas USA, Richmond, Virginia, *Unarmed Security Officer*

This particular employer also had openings currently available. The job site listed is West Point, Virginia. The DOT number is identified as 372.667-038. The listed salary is "$7/hour (Pay increased to $9/hour after 1-2 weeks of training and drug screen. Applicant must complete DCJS training within 90 days of employment as per State guidelines.)" This is listed as a 40-hour per week job. (EX 15-1, at 12).

Analysis

Employer argues that it made a suitable job within the company available to Claimant, but that Claimant abandoned that job. (Employer's Brief, at 16). Employer also argues that Claimant was released to full duty work without restrictions on March 9, 2003, and again on June 10, 2003, and that after March 9, Claimant did not attempt to look for work. Therefore, Employer argues that Claimant is not entitled to temporary total disability from December 24, 2002, through May 11, 2003. (Employer's Brief, at 17).

Employer further argues that Claimant is not entitled to temporary total disability from June 11, 2003, through October 26, 2003, because Claimant was offered a suitable job within the company but that "Claimant refused the offer of employment by intentionally abandoning the position on December 23, 2003," and intentionally reduced his income. (Employer's Brief, at 17-18). Employer goes on to assert that when Claimant did return to light duty work, he "merely rested in the carpentry shop for eight weeks, eight hours per day, and performed little work." (Employer's Brief, at 18). Employer highlights Mr. Davis's testimony that "if the Claimant had not abandoned his position, there would have been light duty work available to him." (Employer's Brief, at 18).

Employer further asserts that Claimant did not engage in a diligent job search because he did not begin looking for work until March 14, 2003, and did not secure a job until May 12, 2003, when he began working for Hy-Tech Auto Body. Employer argues that Claimant also was not diligent in his job search after he was laid off from Hy-Tech Auto Body on June 10, 2003, and did not work again until October 27, 2003, when he began work as an estimator. (Employer's Brief, at 18-19).

Claimant argues that the labor market survey should be given less weight for several reasons. First, the survey was performed at the "last minute" and "did not accurately take into consideration Mr. Long's geographical region." Second, Ms. Swartzbaugh failed to meet with Claimant before conducting the survey. Third, Ms. Swartzbaugh was not familiar with Claimant's educational abilities and failed to perform any educational assessments on Claimant. Finally, Claimant argues that while the labor market survey purports that Claimant has a wage earning capacity between $6.00 and $9.00 per hour, only one job listed in the survey pays $9.00 per hour. (Claimant's Brief, at 27).

Based upon the evidence presented, I find that the labor market survey offered by Employer fails to show that any of the jobs listed were available during the first time period of December 24, 2002, to May 11, 2003. Therefore, Employer would only be able to meet its burden of proof by proving that it offered Claimant a light duty job tailored to his physical

limitations, and that the job was necessary to the business and that Claimant was capable of performing such work. That burden of proof was not met by Employer in the instance of the first period of temporary total disability. When Claimant was released to perform light duty work by Dr. Carlson on February 3, 2003, Claimant was plainly told that there was no light duty work for him and that his full duty position as a carpenter had been filled. (TR. at 75-76, 114-15).

Claimant further testified, and Employer did not dispute either through testimony or evidence, that Employer has not offered Claimant a light duty job at any time since February 3, 2003. (TR. at 76). As stated above, if an injured employee is offered a job that later becomes unavailable, then the employer's burden is no longer satisfied, and the employer then must show other suitable alternate employment. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999). Employer's argument that light duty work would have been available to Claimant had he not abandoned his position necessarily fails in light of the previous finding that Claimant did not quit work on December 23, 2002. Further, Claimant credibly testified, as I found above, that he was in pain as a result of an epidural injection that he received three days prior. Claimant cannot be placed in a position where he is forced to choose between working in severe pain to keep his position or seeking relief from the pain that he has been in for an extended period of time.

The same outcome applies to the second period of temporary total disability, June 11, 2003, through and including October 26, 2003. For all of the positions listed, the earliest that any job was listed as available was within one to weeks prior to the beginning of the labor market survey (the positions at Williamsburg Pottery Outlets, Edison Parking Management, and West Gate Resort). Ms. Swartzbaugh testified that she did not receive the referral for the labor market survey until October 28, 2003, two days after the period for which Claimant seeks a finding of temporary total disability. The other positions listed indicate that the jobs are "currently available," but lack in further specificity. Therefore, I find that Employer has failed to show that any suitable alternate employment was available within the time during which Claimant was able to seek work.

Even if the positions were found to be available for a one to two week period of time at the end of the second temporary total disability period, I would still find that none of the jobs listed in the labor market survey are appropriate for Claimant. No specific duties are listed for any of the particular jobs; instead, there is referenced for each job a *Dictionary of Occupational Titles* identification number, but no further explanation is given as to the exact duties expected in each position. The labor market survey, while stating that it takes into account Claimant's capabilities as per the functional capacity evaluation, also does not state what particular accommodations, if any, any of the mentioned potential employers would be willing to make if any of the duties went beyond Claimant's capabilities. Therefore, based upon the lack of information provided, I find that Employer has failed to show that suitable alternate employment existed during Claimant's second total disability period.

Employer's argument that Claimant did not begin searching for employment until March 14, 2003, necessarily fails. After a claimant establishes a prima facie case of total disability, it is the burden of the employer to show that suitable alternate employment or an appropriate job within the company was available *before* the burden shifts back to the claimant to show that he

engaged in a diligent job search. Because Employer failed to show any form of suitable alternate employment, the issue as to whether Claimant engaged in a diligent job search need not be reached.

Temporary Partial Disability

Claimant also seeks two periods of temporary partial disability: May 12, 2003, through June 10, 2003, inclusive, and from October 27, 2003, through the present and continuing. When an injured claimant is employed, but in a job different from his regular and usual employment, and as a result, sustains a loss of wage-earning capacity, he is entitled to temporary partial disability benefits. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 516 (4th Cir. 2000); *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791, 793 (1978). If a claimant demonstrates a loss of wage-earning capacity, pursuant to Section 8(e) of the Act, he is entitled to two-thirds of the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity in the same or other employment; a claimant may be paid at this rate during the continuance of the disability but cannot be paid for more than five years. 33 U.S.C. §908(e). An injured claimant's wage-earning capacity is determined "by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity;" otherwise, wage-earning capacity is determined by taking into account the nature of the claimant's injury, the degree of physical impairment, his usual employment, and any other factors that might affect the claimant's ability to earn wages in the future. *Id.* §908(h).

Employer argues that Claimant is not entitled to temporary partial disability from October 27, 2003, to the present and continuing because Claimant abandoned his light duty employment with Employer. Employer asserts that Claimant intentionally abandoned his position, in which he earned $17.79 per hour, and is now working as an estimator for only $6.00 per hour. (Employer's Brief, at 19).

Claimant testified that he worked as an automobile detailer for Hy Tech Auto from May 12, 2003, until he was laid off on June 10, 2003. Claimant testified that he earned $6.25 per week for forty hours per week. (TR. at 82-83). Claimant submitted copies of his pay records from this job as well. These records show that Claimant made a gross weekly wage between $148.62 (week preceding June 6, 2003) and $234.72 (week preceding May 23, 2003). On the pay stub from May 23, 2003, the hourly rate is noted as $6.00 per hour, not $6.25 per hour. (CX 6).

Claimant also credibly testified that he has been working as an estimator for Parks Contracting since October 27, 2003, that he earns $6.00 per hour, and works forty hours per week. He further testified that there is no arrangement in place to award him any type of commission in addition to his hourly salary. (TR. at 81-82, 89-90). Claimant also submitted into evidence copies of his weekly pay records from Parks Contracting from October 31, 2003, through November 21, 2003, which show a weekly salary of $240.00. (CX 7).

Upon consideration of the evidence and testimony, I find that Claimant earned $6.00 per hour in his position as automobile detailer at Hy Tech Auto, and that he earned an average of $201.43 per week while working there. I also find that this amount reasonably and fairly

represents his wage-earning capacity from May 12, 2003, through June 10, 2003, pursuant to Section 8(h) of the Act, given Claimant's injury and his abilities. This amount is the appropriate amount in determining Claimant's wage-earning capacity, as it reflects the wages that Claimant actually received. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 406 (1989). The parties previously stipulated that Claimant's former average weekly wage had been $768.91. (JX 1). Therefore, Claimant's weekly loss of wages is equal to $567.48. Given this evidence, Claimant is entitled to temporary partial disability compensation from May 12, 2003, through and including June 10, 2003, at a rate of $378.39 per week. Although Claimant requests in his post hearing brief that he receive temporary partial disability benefits at the rate of $356.13 per week, the amount of $378.39 per week is appropriate given the amount of actual wages Claimant earned during this time period.

Further, I find that the $6.00 hourly wage, or $240.00 per week, earned by Claimant in his current position as an estimator reasonably and fairly represents his wage-earning capacity pursuant to Section 8(h) of the Act. Therefore, Claimant's weekly loss of wages is equal to $528.91. Given this evidence, Claimant is entitled to temporary partial disability compensation from October 27, 2003, through the present and continuing at a rate of $352.62 per week.

Notice of Controversion

Claimant has requested that a penalty be imposed against Employer for failure to file a timely Notice of Controversion. (Claimant's Brief, at 28). Employer does not address the issue of controversion in its post-hearing brief.

Section 14(a) of the Act requires that an employer must pay compensation except where the employer controverts liability. Section 914(d) addresses what an employer must do to controvert a claimant's right to compensation, stating in pertinent part:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

In addition, 20 C.F.R. §702.251 provides that

> Where the employer controverts the right to compensation after notice or knowledge of the injury or death, or after receipt of a written claim, he shall give notice thereof, stating the reasons for controverting the right to compensation, using the form prescribed by the Director. Such notice, or answer to the claim, shall be filed with the district director within 14 days from the date the employer receives notice or has knowledge of the injury or death. The original notice shall be sent to the district director having jurisdiction, and a copy thereof shall be given or mailed to the claimant.

While a Notice of Controversion need not be in any particular form, it must include the information set forth pursuant to 33 U.S.C. § 914(d), namely: (1) a statement that the right to compensation is controverted; (2) the name of the claimant; (3) the name of the employer; (4) the date of the alleged injury; and (5) the grounds for controversion. *See also Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73, 80 fn.6 (1994).

By mandating a penalty of ten percent if an employer fails to either pay compensation or file a Notice of Controversion, Section 14(e) of the Act encourages the prompt payment of benefits, to ensure that claimants receive the full amount due, and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the Department of Labor's attention. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184, 192 (1989) (en banc), *aff'd in pert. part sub nom.*, *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990); *Grant v. Portland Stevedoring Co*., 16 BRBS 267, 269 (1984), *on recon*., 17 BRBS 20 (1985). The Fourth Circuit has stated that the Section 14(e) "penalty is mandatory unless non-payment [or the failure to timely controvert] is due to conditions beyond employer's control." *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 171 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978). The Board has held that an excuse from filing a controversion must be "based on a showing that employer was prevented from making payments or filing notices because of circumstances beyond its control." *Gulley v. Ingalls Shipbuilding, Inc*., 22 BRBS 262, 266 (1989), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990). An employer's liability for a Section 14(e) penalty terminates when the Department of Labor knew of the facts that a proper notice would have revealed. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17, 20 (1992). An employer is only liable for those compensation installments that become due prior to the date that the employer filed a notice of controversion. *Cox v. Army Times Publ'g Co.*, 19 BRBS 195, 198 (1987); *Harris v. Lambert's Point Docks*, 15 BRBS 33, 36 (1982), *aff'd*, 718 F.2d 644 (4th Cir. 1983).

In the instant matter, the record indicates that Claimant requested that the District Director schedule an informal conference in this matter on January 20, 2003. (CX 5). Claimant filed his LS-18 on June 1, 2003. Employer did not file a form LS-18 until June 17, 2003. Employer filed its first Report of Injury with this office on July 3, 2003. There is no evidence in the record that a form LS-207, Notice of Controversion was filed.

In considering this request for the imposition of penalties, I find that insufficient evidence has been presented to make the determination. There are obviously additional documents within the possession of the District Director, OWCP, such as the original claim, any responses by the Employer, etc. Therefore, no finding can be made regarding whether penalties should be imposed, and that determination is left for the District Director.

Order

Accordingly, it is hereby ordered that:

1. Employer, Washington Group International, is hereby ordered to pay to Claimant, Timothy Long, compensation for temporary total disability from December 24, 2002,

through May 11, 2003, inclusive, and from June 11, 2003, through October 26, 2003, inclusive, at the stipulated compensation rate of $512.61;

2. Employer, Washington Group International, is also hereby ordered to pay to Claimant, Timothy Long, compensation for temporary partial disability, from May 12, 2003, through June 10, 2003, inclusive, at the rate of $378.39 per week;

3. Employer, Washington Group International, is also hereby ordered to pay to Claimant, Timothy Long, compensation for temporary partial disability, from October 27, 2003, through the present and continuing, at the rate of $352.62 per week;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C.§1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

8. The District Director, OWCP is authorized to determine whether a 10% penalty should be paid to Claimant pursuant to §14(e)].

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RICHARD E. HUDDLESTON
Administrative Law Judge